(23,060)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 984.

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, APPELLANTS,

vs.

GEORGE A. DAVISSON AND FAY ETTA OWENS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it Remembered, that heretofore *on* to-wit, on the 14th day of August, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein pending, entitled George A. Davisson, plaintiff, and Etta Owens, defendant, appellees, vs. Citizens National Bank of Roswell, appellant, which said transcript of record was and is in the following words and figures, to-wit:

2 Be it remembered, That on the 14th day of March, A. D. 1910, there was filed in the office of the Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, in cause No. 1414 on the civil docket of said Court, wherein George A. Davisson is plaintiff, and the Citizens National Bank of Roswell, et al., are defendants, a præcipe which said Præcipe is in words and figures as follows, to-wit:

Præcipe.

In the District Court, Chaves County, New Mexico.

Cause No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK et al., Defendants.

A final judgment having been rendered in the above-entitled cause, from which appeals have been taken both by the plaintiff and the defendant, Etta Owens, for herself and co-executors, and said appellants being desirous that the judgment of the trial court, together with its findings adversely affecting their interest, shall be reveiwed by the Supreme Court in and for the Territory of New Mexico, the clerk is hereby requested to make out a transcript of the proceedings had in the district court of Chaves County, embodying therein the following papers, to-wit:

1. This præcipe;
2. First Amended Complaint;
3. Amended answer of Citizens National Bank;
4. Plaintiff's Reply;
5. Answer and Cross-Complaint of defendants, Etta Owens, et al.;

3 6. Answer of defendant, Citizens National Bank, to Cross-Complaint of Etta Owens, et al.;

7. Reply of Etta Owens, et al.;
8. Stenographer's Transcript;
9. Court's Opinion;
10. Final Judgment with allowance of appeals as therein set forth;
11. Plaintiff's Appeal Bond;

12. Appeal Bond of defendants, Etta Owens, et al.

The Clerk will also attach a certificate showing all costs in the District Court, including his own and the stenographer's fees for preparing the transcript of record.

(Signed) W. A. DUNN,
Roswell, New Mexico,
Attorney for Plaintiff.

(Signed) ED. S. GIBBANY,
Roswell, New Mexico,
Attorney for Defendants Etta Owens and Co-Executors.

Endorsement: No. 1414. Chaves County Dist. Court. George A. Davisson, Pl't'ff, v. Citizens National Bank, et al., Defendants. Præcipe. Fifth Judicial District Court, County of Chaves. Filed in my office, Mar. 14, 1910. S. I. Roberts, Clerk. By —— ——, Deputy.

4 Be it further remembered that on the 24th day of April, 1909, there was filed in the office of said Clerk, a first Amended Complaint in said cause, which said First Amended Complaint is in words and figures as follows, to-wit:

First Amended Complaint.

In the District Court of Chaves County, New Mexico.

Cause No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Comes now the Plaintiff in the above entitled and numbered cause and by leave of the Courts files this, his First Amended Complaint in lieu of his original Complaint heretofore filed, and states:

1. That at all the times hereinafter mentioned he was engaged in the business of real estate broker at Roswell, New Mexico, and as such bought and sold real estate and other property in Chaves County, New Mexico and elsewhere on commission.

2. That the defendant, Citizens National Bank, is and was at all the times herein mentioned a national banking corporation duly organized and incorporated under the laws of the United States.

3. That on or about the 15th day of August, 1908, in Chaves County, New Mexico, the defendant, Etta Owens, listed with Plaintiff for sale by him on commission, the following described property, to-wit:

The S½ of the NE¼ and the N½ of the SE¼ of Section 12, and the S½ of the NW¼ and N½ of the SW¼ and the SW¼ of the SW¼ of Sec. 7, in Twp. 11 South, Range 24 and 25 East of N. M. P. M. containing 360 acres, together with a one-third in-

terest in the Texas Ditch, and personal property described as follows—between 75 and 80 chickens, between 30 and 40 hogs,
5 1 milch cow, 1 sprayer, 1 incubator and all furniture excepting 1 piano, one couch, 1 folding bed, 2 or 3 chairs and a few pictures, it being agreed that the records of Chaves County might be looked to for further description of said property,—and then and there employed the plaintiff to procure a purchaser for such property at the price of $80,000.00, agreeing to pay the plaintiff a commission of $5,000.00 in the event he should procure a purchaser at said price.

4. That plaintiff, having accepted such employment and entered into said agreement did, on the 21st day of August, 1908, procure one C. C. Berryman as a purchaser for said property and the defendant, Etta Owens, accepted him as a person ready, willing and able to buy the same upon terms satisfactory to her.

5. That thereupon said defendant, Owens, and said C. C. Berryman made and entered into an agreement for the sale and purchase of the property above described, a copy of which agreement is hereto annexed, marked Exhibit "A" and made a part hereof.

6. That on or about September 10, 1908 the defendant, Owens, submitted to said Berryman an abstract of title to the land above described, at which time she adivsed him that the legal title thereof was vested in her deceased husband, namely Solon B. Owens, who had shortly prior thereto departed this life leaving a will, by the terms of which executors had been appointed for the closing of his estate.

7. That the defendant, Owens, was on said date ready, willing and able to deliver conveyances from the executors of said Solon B. Owens, deceased, transferring to Berryman a good and sufficient title to said property, but at the special instance and request of said Berryman, the defendant, Owens, agreed to have the executors of said estate apply to the District Court of Chaves County for orders authorizing and confirming the sale of said property, accord-
6 ing to the terms of the contract set forth in Exhibit "A" hereto—and it was thereupon stipulated that Berryman should take immediate possession of said property and that defendant, Owens should at once cause said application to be made to the District Court, it being agreed that the time for finally closing the transaction should be extended until such orders of the District Court could be produced by the use of reasonable diligence.

8. That the defendant, Owens, caused prompt application to be made by the said executors to the District Court of Chaves County for an order authorizing said sale, and such order was in due course on, to-wit, the 7th day of October, 1908, made, but said Berryman, after retaining possession of the property aforesaid for a few days, totally abandoned same and abandoned and refused to further carry out his contracts and agreements made as aforesaid, with the defendant, Owens.

9. Upon information and belief, that the defendant, Owens, has at all times been and is now ready to perform all the foregoing agreements made, as aforesaid, with C. C. Berryman.

10. That on the 21st day of August, 1908, said C. C. Berryman paid to the defendant, Owens, the sum of $10,000, as specified and provided for in exhibit "A" hereto, of which amount, the sum of $9173.32 was paid by the check of said Berryman drawn on the Citizens Bank & Trust Company of Arkadelphia, Arkansas, payable to the plaintiff as the agent and representative of the defendant, Etta Owens; which check was by agreement of the parties, plaintiff and defendants, deposited with defendant, Citizens National Bank, who, as plaintiff is informed and believes collected the money thereon, and at all times treated the same as cash, such check being of the value of $9,173.32, at all times while in possession of said Bank.

11. That on said 21st day of August the defendant, Owens, gave a written order to the plaintiff *directing the* said defendant bank for the payment of $5,000.00, in full of plaintiff's commis-
7 sion for making said sale, a copy of which order is hereto annexed, marked exhibit "B" and made a part hereof.

12. That in all the foregoing transactions and contracts made by the defendant, Owens, while made in her name were, as plaintiff is informed and believes, made for the benefit of the estate of said Solon B. Owens, deceased, and as an executor of said estate, which the said Mrs. Etta Owens in fact was at all the times mentioned in this complaint.

13. That plaintiff presented to the said defendant bank with due diligence the order set forth in Exhibit "B", same being so presented on said 21st day of August, 1908, and has since said time demanded of said bank the payment of the $5000.00 in said order specified, but said bank has failed and refused and still fails and refuses the same to pay, or any part thereof.

14. That plaintiff has demanded of both defendants said sum of $5,000.00 but they have each failed and refused the same to pay or any part thereof.

Whereof, he prays for judgment against defendants for his said debt with interest thereon; all costs of suits and for general relief.

(Signed) W. A. DUNN.
Roswell, New Mexico, Attorney for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Chaves:

George A. Davisson being duly sworn, upon oath says,—that he is the plaintiff named in the foregoing amended complaint,—that he has read said complaint and same is within his knowledge true, except as to those matters stated upon information and belief,
8 and as to those matters he believes them to be true.

(Signed) GEORGE A. DAVISSON.

Subscribed and sworn to before me this 24th day of April, 1909.

[SEAL.] (Signed) THOS. A. HARRISON,
Notary Public.

My com. Exp. 4-18-1911.

Ex. A.

Sales Contract.

TERRITORY OF NEW MEXICO,
County of Chaves:

This contract of sale made this 21st day of August, 1908, by and between Mrs. Etta Owens, of Roswell, New Mexico, party of the first part, and C. C. Berryman, of Arkadelphia, Arkansas, party of the second part. Witnesseth:

1st. That the party of the first part through *their* duly authorized agent, G. A. Davisson of Roswell, New Mexico, sells and agrees to convey to the party of the second part, by deed with covenants of general warranty, the following lands lying and being situated in Chaves County, New Mexico, to-wit: The S½ of the NE¼ and the N½ of the SE¼ of Section 12 and the S½ of the NW¼ and the N½ of the SW¼ and the SW¼ of the SW¼ of Section 7 in Township 11 S. R. 24 and 25 E. of N. M. P. M., containing 360 acres, together with a one-third interest in the Texas Ditch and all personal property described as follows: Between seventy-five and eighty chickens; between thirty and forty hogs; one milch cow; one sprayer; one incubator and all furniture excepting one piano; one couch; one folding bed; two or three chairs and a few pictures.

It is hereby agreed that the records of Chaves County, may be looked to for further description of said property.

9 2nd. The party of the first part shall within ten days from date furnish to the party of the second part, at Roswell, New Mexico a complete abstract of title down to date for the above described land, which abstract shall show a good merchantable title in the party of the first part.

3rd. The party of the second part*y* shall have until the 10th of September to examine said abstract of title, and if the same shows a good title, then this deal shall be closed at Roswell New Mexico, on or before September 10th, 1908, by the party of the first part executing a warranty deed for the said land and premises to the party of the second part*y* — paying the consideration for the said land as hereinafter stated.

4th. The party of the second part agrees to pay for the said land the sum of $80,000.00 payable as follows: $10,000.00 cash this day paid the receipt of which is hereby acknowledged, which sum of $10,000.00 shall be applied upon the purchase money mentioned and to assume one *none* of $12,000.00 drawing 8 per cent interest from date of delivery or closing this deal; said note payable to the Union Central Life Insurance Company of Cincinnati, Ohio, and due 1913, and to execute five notes of $11,600.00 each, due September 10th, 1909, 1910, 1911, 1912, and 1913, drawing interest at the rate of 6 per cent per annum.

5th. The said property shall be clear of all incumbrance, excepting the $12,000.00 mortgage, including the taxes for the current year.

6th. If, upon examination of the said abstract of title, it is found that the title is not a good merchantable title, then any objections made to said title, shall be pointed out by the party of the second part, and then the party of the first part shall have ten days in which to cure said objections. Should it prove, upon examination of said abstract that the said title is not good, and same cannot be made good within such reasonable time, then it shall be the duty of the party of the first part to perfect said title at *their* expense, promptly in accordance with the requirements of the party of the
10 second part, within the time stated and if the party of the first part fails, neglects, or refuses to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part who shall repay at Roswell, New Mexico, such sum of money as is expended by the party of the second part in perfecting said title, and if upon examination of said title it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annul-ed and the said $10,000.00 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part.

7th. Now, if the party of the first part complies with this contract and furnished the abstract as provided for and the title is shown to be good or can be made good and tenders to the party of the second part at Roswell, New Mexico, a warranty deed as provided for, and the party of the second part shall fail, neglect or refuse to comply with this contract, shall fail to accept deed and execute the said notes as provided for, then in such event, the party of the second part shall forfeit the said $10,000.00 paid, at the option of the party of the first part, or at his option and the party of the first part shall have a cause of action against the party of the second part, enforceable in the courts of Chaves County, New Mexico, for a specific performance of contract.

8th. Should the party of the second part, upon examination of said abstract, find the title to the said property good and within the time stated, stand willing and able to consummate this deal, to pay the balance of purchase money and execute the notes as above provided for and the party of the first part shall fail, neglect or refuse to execute said warranty deed in accordance with this contract, then in such event, the party of the second part shall have a cause
11 of action against the party of the first part, enforceable in the courts of Chaves County, New Mexico, for a specific performance of contract.

9th. Possession of said property shall be given on or before the 10th day of September, 1908.

Witness our hands in duplicate on this 21st day of August, 1908.

MRS. ETTA OWENS.
G. A. DAVISSON, *Agt.*
C. C. BERRYMAN.

Ex. B.

The Citizens National Bank, Roswell, New Mexico:

You are hereby authorized to pay to G. A. Davisson, $5,000.00 being commission in full on the sale of my 360 acres of land to C. C. Berryman, at the time the said deal is closed or terminated.

Witness my hand this 21st day of August, 1908.

MRS. ETTA OWENS.

Endorsement: No. 1414. District Court, Chaves County. George A. Davisson, Plaintiff, vs. Citizens National Bank of Roswell New Mexico, and Etta Owens, Defendants. First Amended Complaint. Fifth Judicial District Court, Filed in my office April 24, 1909. S. I. Roberts, Clerk. By —— ——, Deputy. W. A. Dunn, Roswell, New Mexico, Attorney for Plaintiff.

12 Be it further remembered that on the 11th day of May, A. D. 1909, there was filed in the office of said Clerk, an amended answer in said cause, which said Amended Answer, is in words and figures as follows, to-wit:—

In the District Court of the County of Chaves, New Mexico.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK and ETTA OWENS, Defendants.

Answer of Citizens National Bank.

Comes now one of above named defendants, to-wit Citizens Nat'l Bank by its attorneys W. C. Reid and R. E. Lund and answers and defends plaintiff's action and Complaint, and answering says:

1. This defendant admits that at the times named by plaintiff it was and now is a corporation under the Banking Laws of the United States, and was and is conducting business at Roswell, Chaves County New Mexico.

2. As to the matters stated in Paragraphs 1, 3, 4 and 5 of Complaint this defendant denies that it was a party thereto or had knowledge of, or any possible concern with them or any of them in any manner whatsoever.

3. From information and belief, this defendant denies the several allegations of the Complaint at Par. nos. 6, 7, 8, 9, 10 and 12 thereof and charges that if any of such matters and things were done, performed or contracted by any of the parties thereto, they and each of them were wholly without the knowledge or consent of this defendant; that it was not, directly or indirectly a party thereto or involved therein and that it had no responsibility for, or concern

with the same in any manner, except as to the one allegation, to-wit:

13 Par. 10 which alleges that defendant Etta Owens deposited with this defendant in the month of August 1908 the sum of ten thousand dollars; this allegation, this defendant wholly denies and states the truth to be that said defendant Etta Owens did not deposit the said sum or any sum with this defendant of the nature or at the time stated.

(*a*) Answering paragraph 10, this defendant denies upon information and belief that C. C. Berryman paid to defendant Owens the sum of ten thousand dollars or any other sum and further denies that the sum of $9173.32 or any other sum was paid to said defendant Owens by said Berryman or her agent by check, and denies that any check as alleged in said paragraph was deposited with this defendant as a bank deposit and denies that it collected said check and denies that it treated said check as cash.

4. This defendant further answering admits that plaintiff presented to it, probably during the month of September, 1908, an order of the character set forth in complaint, but of which defendant kept no copy, but which this defendant could not and did not pay, or honor, for the reasons: (1) same did not request or demand payment; (2) the conditions attached and stated therein made it improper and unlawful for this defendant thereof to receive or honor or undertake to decide as to the payment thereof at any time—it not having the form or substance of a check or Draft on a National Bank; and (3) Drawer had no funds with this defendant out of which any draft or check, even if the same had been properly and lawfully drawn by her, could have been honored and paid.

5. This defendant further answering absolutely denies any and all liability to plaintiff on any account whatsoever and says Nihil Debit to every part of his said complaint.

Further Defense—New Matter.

As New Matter, this defendant further answers and defends:

14 1. That on the 22nd day of August 1908, one C. C. Berryman placed with this defendant his check for the sum of $9,173.32 to be held in trust for him until the 10th day of September following subject to the following stipulation orally made to the Cashier of said Bank, and taken in writing, to-wit:

(Copy.)

"Escrow—Perryman & Owens."

"Check enclosed to be held in escrow until Sept. 10th when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to Citizens Bank & Trust Company, Arkadelphia, Ark., for examination. No money to — paid over until abstract is approved by purchaser's attorney."

Don't deliver enclosed papers to anybody.

(Signed) J. J. JAFFA, *Cashier.*"

2. That *an* the 22nd day of September 1908 or thereabout said depositor C. C. Berryman renewed his former demand upon this defendant for the return of his check or its equivalent, so placed as above set forth. There had been, on the part of defendant Etta Owens or any one for her no attempt to meet the terms and conditions under which the said deposit by said Berryman was made with this defendant; no Instrument of Conveyance of the title to the lands in question or to any lands had been placed with, or tendered to the Bank this defendant, by said Etta Owens or any one on her behalf, *not* had any abstract of title showing title in her—said Etta Owens been tendered or deposited with this defendant, the terms and conditions under which the said deposit was made this defendant having wholly failed, and the time limit having long since passed, this defendant, after full legal counsel had been obtained of its duty and obligation in the premises did on the — day of September following—1908 honor the check of said Berryman and did pay to him the whole of said sum deposited to-wit said $9173.32 and thereby ended its obligation.

3. This defendant further alleges that the foregoing stipulation taken by its Cashier, at the time of the deposit of said Berryman check or Draft, was taken in the presence of both contracting parties, Owens and Berryman, and that plaintiff also was present; that this defendant had or has no other or further orders or directions from said C. C. Berryman as to the use and disposition of the said sum so deposited by him, and was at all times, following the said deposit on said 22nd day of August, '08, governed by, and acted subject to the terms of said stipulation, as such depository for and on behalf of said Berryman.

4. This defendant alleges that it was at all times the agent of said depositor C. C. Berryman, subject only to a full and strict performance of the time and the terms of the stipulation given by him; that whatever may have been the relations of the parties with this defendant and the said deposit, that on the entire failure of stated conditions and the full lapse of the time and terms given to this defendant, upon demand by said depositor Berryman for the return of his deposit, this defendant had no authority or right to refuse his demand and therefore returned the said sum to him.

5. This defendant having fully answered prays the court that it be hence dismissed without day, and that it have and recover its costs and necessary expenditures herein from plaintiff.

(Signed) W. C. REID.
R. E. LUND.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

J. J. Jaffa, being first duly sworn, upon his oath says: I am the Cashier and agent of above named defendant, Citizens National Bank; that I have read the foregoing Answer, know its contents and the same are true, except as to such matters as are stated upon information and belief, and as to those I believe them to be true.

(Signed) J. J. JAFFA.

16 Subscribed and sworn to before me this 11th day of May A. D. 1908.

[SEAL.] (Signed) ROBT. E. LUND,
Notary Public.

Endorsement: In the District Court, Chaves County, New Mexico. George A. Davisson, Plaintiff, vs. Citizens National Bank and Etta Owens, Defendants. Amended Answer. Fifth Judicial District Court. Filed in my office, May 11, 1909. S. I. Roberts, clerk. By —— ——, deputy. W. C. Reid & R. E. Lund, Roswell, N. M., Att'ys for Citizens Nat'l Bank.

Be it further remembered, that on the 24th day of April, A. D. 1909, there was filed in the office of the said Clerk, a Reply, which said Reply is in words and figures as follows, to-wit:

Reply.

In the District Court of Chaves County, New Mexico.

Cause No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK, OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Replying to the answer by way of new matter made by defendant Citizens National Bank, plaintiff states:

17 1. That he denies the allegation made in paragraph 1, of said answer by way of new matter, to the effect that one C. C. Berryman deposited with said defendant his check, as therein alleged, such check being in fact deposited with said defendant by plaintiff.

2. That he denies any knowledge or information sufficient to form a belief concerning the allegation in Paragraph 2 of said answer by way of new matter, to the effect that said defendant bank paid to C. C. Berryman the sum $9,173.32, but plaintiff alleges that if any such payment was made it was after full knowledge on the part of said bank of all the matters and things alleged in the first amended complaint, and after said bank had been forbidden by the defendant, Owens, from making the payment, as alleged.

3. Replying to the 3rd Paragraph of said answer by way of new matter, plaintiff states upon information and belief that said defendant bank was advised by Berryman, himself, of all the matters and things alleged in the first amended complaint, prior to the date when Berryman received the proceeds of said check, if in fact he did receive them.

4. Replying to the 4th paragraph of said answer by way of new matter, plaintiff denies each and every allegation thereof.

Wherefore, plaintiff prays for judgment as in his first amended complaint stated.

(Signed) W. A. DUNN,
Attorney for Plaintiff, Roswell, New Mexico.

TERRITORY OF NEW MEXICO,
County of Chaves:

George A. Davisson, being duly sworn, upon oath states,—that he is plaintiff named in the foregoing reply,—that he has read said Reply, and the same with the denials therein made is within his knowledge true, excepting as to those matters stated on infor-
18 mation and belief, and as to those matters he believes them to be true.

(Signed) GEORGE A. DAVISSON.

Subscribed and sworn to before me this 24th day of April, 1909.

[SEAL.] (Signed) THOS. A. HARRISON,
Notary Public.

My com. Exp. 4-18-1911.

Endorsement: No. 1414. District Court, Chaves County. George A. Davisson, Plaintiff, vs. Citizens National Bank of Roswell, New Mexico, and Etta Owens, Defendants. Reply. Fifth Judicial District Court. Filed in my office, April 24, 1909. S. I. Roberts, clerk. By —— ——, deputy. W. A. Dunn, Roswell, New Mexico, Attorney for Plaintiff.

Be it further remembered that on the 14th day of November, A. D. 1908, there was filed in the office of said Clerk, an answer in said cause, which said Answer is in words and figures as follows, to-wit:

19 In the District Court of Chaves County, New Mexico.

Cause No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Answer of Defendants, Fay Etta Owens et als., Executors.

Come now Fay Etta Owens for herself as one of the executors of the estate of Solon B. Owens, deceased, and for James W. Owens, and Adolphe Andrews her co-executors of said estate and for their answer to the complaint filed herein alleges:

1. The defendant executors admit the execution of the agreement with C. C. Berryman as shown by Plaintiff's exhibit "A" under and by the name Etta Owens and admits that she executed the written

order, a copy of which is attached to complaint as exhibit "B" but alleges that said order was given and was payable only upon the condition therein set out when said sale was consummated and was intended and in fact contingent upon the said sale being completed by said Berryman.

2. Defendant Executors admit the employment of the Complainant to sell the farm described in the complaint and admit the payment of the sum of 9173.32 as part of the purchase money thereon to them and the deposit thereof in the Citizens National Bank of Roswell, New Mexico, but these defendants deny that the proposed purchaser was ever ready, willing and able to complete the purchase of said farm.

Wherefore, defendant executors as to the plaintiff say they are not indebted to said George A. Davisson in any sum whatever, and the sum of money deposited in the Citizens National Bank of Roswell New Mexico is the sole property of the defendant executors and that no other person or persons have any interest therein
20 and pray that the complaint be dismissed as to these defendants and for the cost herein.

Cross-Complaint Against Citizens National Bank of Roswell, New Mexico, Defendant Herein.

1. Said Executors aforesaid complaining of the defendant, the Citizens National Bank of Roswell, N. M., further allege that the said Fay Etta Owens for the said executors under the name of Mrs. Etta Owens, did execute on the 21st day of Aug. 1908 a certain contract of sale as set out in Exhibit "A" of the complaint in this cause filed, which said exhibit is herein referred to for the terms of said agreement with said C. C. Berryman.

2. That upon the execution of the aforesaid contract the said C. C. Berryman paid to said Fay Etta Owens as one of the defendant executors as a part of the purchase price of said lands therein described the sum of $9173.32 which said sum was by agreement of the parties deposited in the Citizens National Bank defendant herein and therewith a copy of said agreement, but that said sum of money so deposited with said defendant, Bank, was and is the property of the defendant executors and said defendant Bank by virtue of said deposit became the trustee of said sum for said executors and said Bank was legally bound to hold the same until payment thereof was demanded by said executors, and until said sale was completed or abandoned by said C. C. Berryman, but in either event was lawfully bound to hold said sum and pay the same only to said executors.

3. That on or before Sept. 10th, 1908 and after the examination of the title to the real estate in said contract of sale described, by said C. C. Berryman who then required that the executors should procure an order of sale of said land from the District Court of Chaves County of New Mexico authorizing said executors to
21 sell and convey their land and upon such requirements by him was informed that such order could not be legally had for

about 30 days under the statutes of this Territory and whereupon it was further agreed in consideration of the delivery of possession of said land by said Fay Etta Owens upon said date to the said Berryman, that the time for the conveyance of the title to said real estate should be extended until such date as said executors should be able to obtain the order of sale of said real estate from the District Court aforesaid as required by said purchaser who then agreed to accept the conveyance of title to be made by said executors as authorized by said order of Court.

4. That afterwards on Oct. 7th, 1908, the said executors did obtain the order of sale for said real estate from said District Court as agreed upon with said Berryman and on the 10th day of Sept., 1908 duly delivered the possession of said farm contracted to be sold as aforesaid to the said Berryman who went into possession thereof on said date.

5. That on the — day of Sept., 1908, the said Berryman served the notice in writing upon said executors and upon the said Citizens National Bank of his intention to abandon said purchase and abandon his said contract and agreement of purchase and in which said notice he demanded the repayment of the purchase money aforesaid which said repayment was by the executors refused.

6. That thereafter the said Berryman abandoned the possession of said farm and removed with his family to his former home in — state of Arkansas leaving no property of any description within the Territory of New Mexico, in the knowledge of the defendant executors and as they verily believe for the purpose of removing himself from the jurisdiction of the Courts of said Territory.

7. That for the reason that the said Berryman is not within the jurisdiction of the Courts of said Territory the defendant executors can not obtain service of process upon him and cannot sue
22 him for specific performance of the contract of sale aforesaid.

8. The said executors upon their part allege that they have done and performed all and ever the things agreed by them to be done and performed in and about said contract of sale and were doing all in their power to faithfully carry out said contract with said Berryman and to comply with his requirements as to the conveyance of said real estate at the time he served them with notice of his intention to abandon that contract and the possession of said real estate and that he would refuse further to carry out the provisions of said contract, and that the defendant executors are now and have been at all times mentioned herein willing to carry out the contract of sale with the said Berryman and their further agreement with him as herein alleged.

9. That the said contract of sale provides that in the event of the failure or refusal of said Berryman to carry out the provisions of said contract that the executors aforesaid may at their option treat the payment of purchase money as forfeited to them by such failure and refusal of said Berryman and said executors have elected to declare said sum of purchase money forfeited by his abandoment of said agreement and have re-taken the possession of said real estate

after the abandonment thereof of Berryman and after the abandonment of said contract by said Berryman and after they had obtained the order of sale for said real estate by said Court as required by him.

10. Wherefore, the defendant executors pray that the defendants, the said Citizens National Bank be adjudged and decreed by the Court to be the Trustee of the defendant executors as to the $9.173.32 purchase money deposited in said Bank for the said executors and that they be ordered to pay said sum to said executors and that the defendant executors have judgment for said sum of $9173.32
23 with cost against the said defendant the Citizens National Bank.

(Signed) ED. S. GIBBANY,
Att'y for Defendant Executors.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

Fay Etta Owens being duly sworn upon oath says that she is one of the executors of the estate of Solon B. Owens deceased and that she has read the foregoing answer and cross complaint and that the matters therein stated are true to the best of her knowledge and belief and that said answer and cross complaint is filed by her on behalf of said executors.

(Signed) MRS. FAY ETTA OWENS.

Subscribed and sworn to before me this 31st day of Oct., 1908.

[SEAL.] (Signed) ED S. GIBBANY,
Notary Public.

Endorsement: No. 1414. In Chaves County District Court. No. 1414. George A. Davisson, Plaintiff, v. Citizens National Bank, Etta Owens, Defendants. Filed in Open Court, Nov. 14, 1908. S. I. Roberts, Clerk. By —— ——, Deputy. Answer. Ed. S. Gibbany, Att'y for Defendants Executors, Roswell, N. M.

24 Be it further remembered that on the 21st day of April, A. D. 1909 there was filed in the office of said Clerk, in said cause an Answer of Citizens Nat'l Bank to Cross-Complaint, etc., which said Answer is in words and figures as follows, to-wit:

District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK et al., Defendants.

Answer.

First Defense.

Comes now the Citizens National Bank of Roswell, by its attorneys R. E. Lund and W. C. Reid, and answers the answer and cross complaint of Etta Owens, a co-defendant herein and states:

1. Defendant the Citizens National Bank of Roswell answering paragraph two of the cross complaint filed by Mrs. Etta Owens denies upon information and belief that C. C. Berryman paid to said Fay Etta Owens the sum of $9,173.32 as a part of the purchase price of the lands described in Exhibit A in the complaint, or any other sum as a part of said purchase price, and denies that said sum ever was or is the property of said Fay Etta Owens or any other person other than said C. C. Berryman, and denies that said bank became a Trustee for said executors or for any other person other than said C. C. Berryman and denies that said bank was bound to hold said sum of money until payment was demanded by the executors of Solon B. Owens or until said sale was completed or abandoned.

2. Defendant, the said Citizens National Bank of Roswell, answering paragraph three of said cross complaint denies each and every allegation therein.

3. Answering paragraph four said defendant, the Citizens National Bank of Roswell denies upon information and belief that possession of the farm was delivered to C. C. Berryman and denies that said C. C. Berryman went into possession thereof.

4. Answering paragraph five of said cross complaint, defendant, the Citizens National Bank states that it has not knowledge or information sufficient to form a belief as to whether said Berryman notified the executors of his intention to abandon the purchase of said lands.

5. Answering paragraph six and seven defendant the Citizens National Bank of Roswell, states that it has not knowledge or information sufficient to form a belief as to the truth of the allegations therein.

6. Answering paragraph eight defendant, the Citizens National Bank of Roswell upon information and belief, denies that the executors mentioned in said paragraph have done and performed all and every of the things agreed by them to be done and performed in and to said contract of sale.

Wherefore, defendant, the Citizens National Bank of Roswell prays that said cross complaint of Fay Etta Owens be dismissed at cost of said cross complainant.

Second Defense.

Answer to Cross Complaint of Fay Etta Owens by Way of New Matter.

First Defense by Way of New Matter.

Defendant the Citizens National Bank of Roswell for its first defense by way of New Matter states:

1. That on or about the 22nd day of August, 1908, one C. C Berryman and the defendant Mrs. Etta Owens, and the plaintiff, Geo. A. Davisson were at defendant bank's place of business and there entered into an agreement which was reduced to writing in

the presence of each of said persons and the defendant bank's Cashier, J. J. Jaffa, said agreement was written out in the presence of each of said persons who thereupon each said that the said writing was their agreement and understanding the said
26 agreement was as follows, to-wit:

Escrow Berryman and Owens.

Check enclosed to be held in Escrow until Sept. 10th, when final settlement is to be made. Deed and abstract to be placed in Escrow with this. Abstract to be forwarded to Citizens Bank & Trust Company, Arkadelphia, Ark., for examination. No money to — paid over until abstract is approved by purchaser's attorney.

Don't deliver enclosed papers to anybody.

(Signed) J. J. JAFFA, *Cashier.*

2. That under the terms of said agreement a deed to certain land and an abstract thereto were to be placed in escrow at a date sufficient to allow for the examination of said abstract and the report thereon prior to September 10, 1908.

3. That no deed or abstract was placed in escrow with the defendant bank and no abstract was approved or reported to be approved to said defendant bank by the purchaser's attorney.

4. That after the date of September 10, 1908, said C. C. Berryman made a demand upon the bank for the money deposited under said agreement, which was the sum of $9173.32, which sum was turned over and paid to said C. C. Berryman on demand.

Second Defense by Way — New Matter.

Defendants upon information and belief *deny* that said C. C. Berryman agreed verbally to extend the time for the carrying out of said contract of sale and further states that if said verbal agreement was made as alleged by cross complainant that said agreement was contrary to the statutes of fraud and is therefore void.

Third Defense by Way of New Matter.

Defendant bank states upon information and belief that said cross complainant was not able and did not give said C. C. Berryman possession of said lands as provided for in said contract Exhibit A set forth in the complaint herein.

27 *Fourth Defense by Way of New Matter.*

Defendant bank alleges upon information and belief that cross complainant is unable to make a good merchantable title to either the land described in said complaint or the water described by said complaint.

Fifth Defense by Way of New Matter.

Defendant bank further alleges upon information and belief that said agreement marked Exhibit "A" in said complaint and referred to by cross-complain-t was induced by fraudulent representations made to said C. C. Berryman as to the amount of water available for said lands and as to the value of the crops raised upon said lands; that said representations were made for the purpose of inducing said Berryman to enter into said contract Exhibit "A" and by reason thereof said Berryman did enter into said contract Exhibit "A." That the said representations were knowingly made with intention to defraud and with the knowledge that said Berryman was relying upon said fraudulent representations; that said C. C. Berryman, as defendant bank is informed and believes, would not have entered into said contract had he not relied upon and believed the fraudulent representations made to him as to the water available to irrigate said described land.

Defendant further states upon information and belief that at the time of entering into the contract of purchase, and as an inducement thereto to said Berryman, cross-complainant falsely represented that by virtue of the will of her late husband she was the sosle and absolute owner of the land and water rights described in said contract. That defendant Bank alleges upon information and belief that said Berryman or his attorney and agent found said representations to be entirely untrue, and that said cross-complainant was not able to make a merchantable title to said land and water rights.

28 *Sixth Defense Made by Way of New Matter.*

Defendant bank for further denial by way of New Matter states: That no money was deposited with said bank as alleged in the cross-complaint herein but certain papers were placed in escrow with said bank as alleged in paragraph one (1) of the First Defense by The Way of New Matter which said paragraph is hereby adopted in full in this sixth defense.

Defendant bank states that no consideration passed from either of the defendant-, Mrs. Etta Owens or C. C. Berryman to said defendant Bank and that said bank did not bind itself to cross-complainant or in any way become responsible for the check so placed in its custody and denies that it is liable to plaintiff or to cross-complainant for said check.

Wherefore, Defendant prays that said Complaint and Cross-Complaint filed herein be dismissed and that defendant recover its costs in this behalf expended.

(Signed) R. E. LUND AND
REID & HERVEY,
Att'ys for Citizens National Bank of Roswell, N. M.,
Roswell, N. M.

TERRITORY OF NEW MEXICO,
County of Chaves:

J. J. Jaffa being first duly sworn upon his oath states that he is Cashier of the Citizens National Bank of Roswell, New Mexico, one of the defendant- herein; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be on information and belief and as to such matters he believes them to be true.

(Signed) J. J. JAFFA.

Subscribed and sworn to before me this 21st day of April, 1909.

[SEAL.] (Signed) ROBT. E. LUND,
Notary Public.

29 Endorsement: No. 1414. In the District Court Chaves County. George A. Davisson vs. Citizens Nat'l Bank, et al. Answer of Citizens Natl. Bank to Cross-Complaint, etc. Fifth Judicial District Court. Filed in my office, Apr. 21, 1909. S. I. Roberts, clerk. By ——, deputy. R. E. Lund, Reid & Hervey, Roswell, N. M., Attorneys for Defendant.

Be it further remembered that on the 18th day of June, A. D. 1909, there was filed in the office of said Clerk, a Reply in said cause which said reply is in words and figures as follows, to-wit:

District Court, Chaves County, New Mexico.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK et al., Defendants.

Reply of Defendant Executors to Answer of the Citizens National Bank.

The defendant executors of the estate of Solon B. Owens, deceased, for reply to the answer of the Citizens National Bank herein, denies each and every allegation of New Matter in said answer
30 contained in its First, Second, Third, Fourth, Fifth and Sixth defenses by way of new matter.

(Signed) ED. S. GIBBANY,
Attorney for Executors of Estate of Solon B. Owens, Deceased.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

Fay Etta Owens, being first duly sworn upon her oath states that she is one of the executors of the estate of Solon B. Owens,

deceased, one of the defendants herein, that she has read the foregoing answer and knows the contents thereof and that the same is true of her own knowledge except as to those matters therein stated to be on information and belief and as to those matters she believes them to be true.

(Signed) MRS. FAY ETTA OWENS.

Subscribed and sworn to before me this 17th day of June, 1909.

[SEAL.] (Signed) NELLIE C. JONES,
Notary Public.

My com. expires Nov. 27, 1912.

Endorsement: No. 1414. Chaves Dist. Court. G. A. Davisson vs. Citizens Nat'l Bank et al. Reply of Defendant executors to Answer of the Citizens Nat'l Bank of Roswell, N. M. Fifth Judicial District Court. Filed in my office, June 18, 1909. S. I. Roberts, clerk. By —— ——, deputy. Ed. S. Gibbany, Roswell, N. M., Att'y for Executors of Estate of Solon B. Owens, Dec'd.

31 In the District Court of the Fifth Judicial District of the Territory of New Mexico within and for the County of Chaves.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK OF ROSWELL, N. M., and ETTA OWENS, Defendants.

Stenographer's Transcript.

In the District Court of Chaves County, New Mexico.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Now on this 19th day of June A. D. 1909, before Honorable William H. Pope, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Fifth Judicial District Courts thereof, at the town of Roswell, in said District, the following proceedings were had in the above entitled cause, to-wit: Jury waived.

32 Present: William A. Dunn, Esq., Attorney for Plaintiff, Roswell, New Mexico; W. C. Reid, Esq., and R. E. Lund, Esq., Attorneys for Citizens Nat. Bank, Roswell, New Mexico; Ed. S. Gibbany, Esq., Attorney for Mrs. Etta Owens, Roswell, New Mexico.

GEORGE A. DAVISSON, called as a witnes in his own behalf, being first duly sworn according to law testified as follows:

Direct examination by Mr. DUNN:

Q. State your name to the court?
A. George A. Davisson.
Q. What business are you engaged in?
A. Real state.
Q. What business were you engaged in on August 21, 1908?
A. Real estate.
Q. At what point?
A. Roswell.
Q. Are you acquainted with one C. C. Berryman?
A. I am.
Q. When did you first get acquainted with Mr. Berryman?
A. Sometime the first part of August I think, about 1909.
Q. You are familiar with the exhibit to which—attached to your complaint as exhibit A, are you?
A. I am.
Q. I will ask you to state where that contract was executed?
A. Room 4 Texas Block. You mean the contract between C. C. Berryman and Mrs. Owens?
Q. Yes.

Mr. LUND: I think the question should be accompanied by the exhibit itself and let the witness identify it.

33 COURT: It is referred to as the contract attached to the complaint.

Mr. DUNN:

Q. Examine Exhibit A and see if that is the paper you have in mind in your answer to the last question?
A. It is.
Q. Who was present when that contract was executed?
A. Mr. Solon Owens, Mrs. Owens, Miss Ada Anderson, Mr. C. C. Berryman and myself.
Q. Was there any consideration paid over to you at that time?
A. There was.
Q. State what it was?
A. Mr. Berryman paid me ten thousand dollars, less accrued interest on a mortgage that was on the land, the check was written for $9,173 and some cents I think thirty-two cents.
Q. To whom was that check made payable?
A. George A. Davisson, agent.
Q. Where was it written?
A. Room 4, Texas Block, on my desk.
Q. Who by?
A. C. C. Berryman.
Q. What institution or bank was that check drawn on?
A. On the Citizens Bank & Trust Co., of Arkadelphia, Arkansas.
Q. What was done with the check after it was written by Mr. Berryman?

A. I took the check, showed it to Mrs. Owens and Solon Owens, and told them that was the first——

Mr. REID: We object to what you said.

COURT: I suppose what he told would be admissible as against——

WITNESS: I told them this was the first payment according to the contract, less accrued interest on a mortgage held by the Union Central Life Insurance Company.

Q. What was done with the check after that?

34 A. I put it in an envelope with the contract and with Mr. Berryman, Mrs. Owens and young Mr. Owens took it to the Citizens National Bank.

Q. With what contract did you put the check?

A. With the contract for the sale of the property.

Q. Exhibit T?

A. Yes sir.

Q. State whether or not that contract was executed there at the same time?

A. It was executed in the office at the same time the check was given.

Q. Who carried the contract and the check to the bank?

A. I did.

Q. State what you did with them on arriving at the bank?

A. Went into Mr. Jaffa's private office. I told Mr. Jaffa this was a contract between Mrs. Owens and Mr. Berryman, whereby Mr. Berryman had bought this property from Mrs. Owens and that the contract would govern the sale and this check was the first payment——

Mr. REID: We object to that—that agreement was in writing and is the best evidence.

COURT: Objection overruled.

WITNESS: On the sale, and that the contract governed the sale of the property.

Mr. DUNN:

Q. Who was present when the check was delivered to Mr. Jaffa?

A. Mrs. Owens, Mr. Owens, Mr. Berryman and myself.

Q. State whether or not anything was said at the time about how long the check should be held?

A. I told Mr. Jaffa that all the papers and the check would be held in the bank until the deal was closed.

Q. Were the papers left there at that time?

A. Yes sir, the contract and the check.

Q. What date was that?

35 A. That was on the 21st day of, I believe, August.

Q. State to the court whether or not anything was afterwards done toward furnishing Mr. Berryman with an abstract?

A. I went to Mr. Herbst, representative of the Union Central Life Insurance Company, and asked him to send for the abstract of title to this property.

Q. Described in the contract?

A. Yes sir. Mr. Herbst received it and it was turned over to Mr. Berryman. Mr. Berryman sent it to his attorney for examination.

Q. When was that delivered to Mr. Berryman?

A. It was somewhere the latter part of August or the 1st of September—I am not sure just the date of it.

Q. 1908?

A. Yes sir.

Q. Was there any statement made to Mr. Berryman at the time the abstract was delivered?

A. I told him it was the abtract of title to the property——

Mr. Reid: We object, if the court please—to what was said to Mr. Berryman. He is not a party to this suit.

Court: What do you say, Mr. Dunn?

Mr. Dunn: Our right to this evidence shows the very establishment of our complaint with this contract. The complaint alleges that we made a contract with Mr. Berryman for the sale of this property, and that the contract provides that he is to be furnished with an abstract of title within a certain time. It is further alleged that that abstract was furnished, together with a statement that the legal title to that property was in the name of Solon B. Owens, deceased—and that after Berryman had had this abstract, presumably sent it to his attorney in Arkansas, that it was returned here, and he demanded that the executor be required to get an order of court authorizing the sale of this property, and that the
36 defendant Mrs. Owens, was proceeding in good faith, to obtain the order of court, give possession of the property to Berryman in the meantime, and that before she had sufficient time to do this he abandoned this contract—the right of the plaintiff to this evidence—the principal of law, as your Honor will understand is that where a vendor of real estate is seeking in good faith to comply with the terms of the contract, and does comply so far as it is within his power—that any payment that may have been made becomes the property of the vendor, and this testimony offered is for the purpose of showing compliance with the terms of this contract.

Court: I will take the evidence pretty fully; any questions of law of course can be settled—but any testimony not legally chargeable against any of the parties I will disregard as against such party.

(Last question read.)

Witness: Described in his contract; he said he would take it to the Citizens National Bank and have it sent to his attorney for examination.

Mr. Dunn:

Q. Was there any statement made about the title to the property at that time?

A. At the time the abstract was delivered to him?

Q. Yes.

A. Nothing further than we told him—spoke something of the will to the property.

Q. What did you say about the will?

Mr. LUND: We desire to make objections from time to time when we think testimony is improper. We object to this.

COURT: Objection overruled.

A. I told him the will wasn't in the abstract but we would have it put in if he wanted it before he sent it to his attorney for examination.

Mr. DUNN:

Q. Do you know whether or not a copy of Solon B. Owens' will had been shown to Mr. Berryman before that time?

37 A. It had.

Q. What was the next conversation you had about this sale, with Mr. Berryman, after you delivered him the abstract?

A. I think the next conversation was that after he received the abstract back from his attorney, he told me——

Mr. LUND: If you- Honor please, he is speaking about what he thinks, not what he knows. I think that is clearly objectionable.

Mr. DUNN:

Q. I will ask you, in saying you think with reference to the time, or with reference——

A. I was thinking with reference to the time—what had been said—thinking whether anything had been said between the time the abstract had been sent and when they received it back.

Q. Did you have any conversation with him after he received it back?

A. I had.

Q. What was said?

A. He said his attorney wanted Mr. Owens to get an order of Court.

Q. For what purpose, if he stated?

A. An order to perfect the title.

Q. Just state the conversation that occurred at that time as near as you can?

A. He came out of Mr. Herbst's office, and I met him in front of the Roswell Title & Trust office; he says "I have that abstract back, and my attorney says I should have an order of court," and I told him I didn't know—that I didn't think we could get an order of court by the tenth of September, and he says "Well let's talk to Mr. Gibbany about it." So we went into Mr. Gibbany's office, and told Mr. Gibbany that his attorney had demanded an order of court, and Mr. Gibbany told him it would take 20 or 30 days, perhaps 40 days, to get this order of court. I told him, "we can give you possession of the property, and Mrs. Owens has rented a house here and is aiming to give you possession on the 10th accord-

38 ing to the contract, and was intending to make you an executor's deed." He says "Well I would rather have and order of court" and he says "I want to move out and stop the expense at the hotel, and so I could get possession it will be all right to——

Mr. REID: We object to any parole evidence being offered here as to the changing of this written contract materially, in that it would be to change the time for the performance of the contract and it is clearly not admissible. The written contract here shows that these transactions were to be closed up on the tenth, and now it is attempted to show that they were changed by parole agreement, contrary to the statute of frauds.

COURT: He may answer.

Mr. REID: Defendant excepts.

WITNESS: To wait for the order of court, providing we could get it with 30 or 60 days' time.

Mr. REID: I suppose our objection might be understood as going to all of this conversation with reference to changing the time in the performance of the contract.

COURT: Yes.

Mr. DUNN:

Q. Who was present when this conversation occurred? In Mr. Gibbany's office?

A. Mr. Gibbany, Mr. J. D. Bell, Mr. Berryman, myself—that's all I remember now.

Q. Was the defendant Mrs. Owens present?

A. I don't think she was, no.

Q. What was done, if anything by Mr. Berryman towards taking possession of the property?

A. We agreed to give him possession and Mrs. Owens said all right and went to the hotel and the next day Mrs. Owens was moved in town, and Mr. Berryman got one of her boys to take out his things and took possession of the property.

Q. Going back to that conversation—do you remember the date of that conversation in Mr. Gibbany's office?

A. It was the ninth—no, it was the 8th—that was the eighth—that conversation.

39 Q. The 8th of what month?

A. September 1908.

Q. State whether or not you were at Mrs. Owens' property in question after Berryman went down there?

A. I was.

Q. Did you have any conversation with him after that time?

A. I did.

Q. State whether or not it was with reference to this property?

A. No, there was nothing said with reference to the purchase—he was just telling me what he was going to do with the place, showing me the apples; he went out with Mr. Donahue and counted the hogs—he was finding out how many he was going to sell and how many he was going to keep.

Q. Had Mrs. Owens been living on the place prior to the time Mr. Berryman went there?

A. She had.

Q. You have already stated I believe that she moved to Roswell?
A. She did.
Q. Was there anyone else on the place?
A. Mr. Donahue.
Q. Did you make a statement just now in regard to him telling you he had sold some apples off the place?
A. I did.
Q. I wish you would repeat that?
A. He told me he was gathering them, he had sold two wagon loads of cull apples that day and got $7.50 for the two wagonloads.
Q. Make any statement to you about the hogs on the place.
A. Yes, he said he was going to sell all but what he would use for himself.
Q. Do you remember any other conversation with Mr. Berryman with reference to this property? While he was living on it?
A. No, I don't.
Q. How long did he remain on the property?
40 A. Until the 22nd day of September, 1908.
Q. I will ask you to examine this paper and state whether or not that was ever in your possession before this?
A. It was.
Q. From whom did you receive that, if you know?
A. Mr. Berryman.
Q. Where did he deliver it to you?
A. In front of the Jaffa-Prager store.
Q. At what time?
A. About twelve o'clock.
Q. What date?
A. Twenty-second—it was the 23rd—either 22nd or 23rd, I am not sure which, of Sept., 1908.

Mr. DUNN: Plaintiff offers in evidence the paper referred to. (Received in evidence in the absence of objection, and marked Plaintiff's Exhibit A.)

Q. After receiving that notice did you have any conversation with the Citizens National Bank or any of its officers?
A. I told Mr. Jaffa that Mr. Berryman had served this on me and wanted his money, but we didn't intend to give him back his money—that he continued the time of this contract long enough for Mrs. Owens to get an order of court.
Q. When was that?
A. That was, I think the 23rd day of September.
Q. Who was present when that conversation occurred?
A. Nobody but me and Mr. Jaffa, that I remember of.
Q. Did you have any further conversation with any of the officers of the defendant bank about this matter?
A. Talked to Mr. Jaffa later about it, and the latter part of September I went to him and told him they were still contending for their money and I understood they were going to bring a lawsuit if he didn't give it up, and he said that he had turned it over to

them, that "Mrs. Owens didn't comply with her contract and
41 they were going to sue us so I decided to turn it over to them."

Q. What was said in reply, if anything?

A. I told him that I intended to collect that money—I intended to collect the money.

Q. Going back to the time when you said you deposited this check there with Mr. Jaffa. I will ask you to state whether or not anything was said about whether the check should be collected?

A. We were all on the outside—I turned around, left Mrs. Owens and young Owens and Mr. Berryman on the sidewalk outside, and went back in and told Mr. Jaffa to collect that check, and I said he had better wire it in at my expense, and I walked out.

Mr. REID: Objected to as irrelevant and immaterial—hasn't been shown that the witness had authority to do that with Mr. Berryman's check.

COURT: The answer may stand.

Mr. DUNN:

Q. Were you ever present at a conversation between Mrs. Owens and C. C. Berryman at which any statement was made with reference to the title to this property in question?

A. I was.

Q. Where was that?

A. At Mrs. Owen's gallery.

Q. What did she say to him if anything in regard to the title to this property?

Mr. LUND: We object, if the Court please; the contract shows what was done with regard to the title; anything she said about the title couldn't change the terms.

Mr. DUNN: The fact that a written contract is made don't bind the parties to any length of time beyond the contract. They have a right to modify the contract and make any kind of a contract they want to. It wouldn't prevent us from showing, up to the time the contract was signed,—from showing anything.

Mr. LUND: We dispute that if your Honor please. This is a proposition of law.

42 COURT: I will hear you gentlemen on that but will take the evidence now.

WITNESS: I showed Mr. Berryman this property.

Mr. DUNN:

Q. Was this before the contract was signed?

A. Yes sir.

Mr. DUNN: That's all.

Cross-examination.

Mr. REID:

Q. I believe you have said that this contract was drawn up in your office in the presence of Mr. Berryman and Mrs. Owens?

A. Yes sir.

Q. When was the check made with reference to the time *of* the contract was *was* drawn?

A. At the time the contract was drawn or just after it was completed. We read it over.

Q. It was all done at the same time was it?

A. Yes sir.

Q. The check was made when Mrs. Owens was present?

A. Yes sir.

Q. What do you mean when you state in your testimony that you took the check to Mrs. Owens?

A. Showed her the check because it was less than $10,000.

Q. She was present all the time, same as you were?

A. Yes, sir. Well she was sitting in another part of the office there—she wasn't near my desk.

Q. You all three took the check and the contract up to the Citizens National Bank and turned them over to Mr. Jaffa?

A. Yes sir.

Q. At the time you turned the check and contract over to Mr. Jaffa, was your agreement with the bank reduced to writing?

A. No sir. It wasn't.

Q. I will ask you if it isn't a fact that at the time that was turned into the bank either you or Mr. Berryman or both of you
43 said to Mr. Jaffa what it was agreed that — should do relative to holding those papers?

A. I said to Mr. Jaffa that the contract would govern the sale between Mrs. Owens and Mr. Berryman—that we wanted to leave it and the money there in the bank until the sale was closed.

Q. Didn't he reduce that to writing and show it to you?

A. I don't know. I didn't see it.

Q. You don't say that is not a fact?

A. I didn't see it.

Q. You hadn't at this time shown Mr. Berryman any evidence of title to that property, up to that time?

A. Only just what I told him about it.

Q. And he hadn't entered into possession at that time?

A. No.

Q. Nothing had been turned over to him at that time?

A. No.

Q. In view of the fact that Berryman had absolutely gotton nothing either as evidence of title or a deed *or* possession, you state to the court that this ten thousand dollars or nine thousand dollars, was to be paid absolutely on this deal?

A. It was.

Q. Irrespective of whether you had any title to the land or not?

A. I told Mr. Berryman to give me a check as agent, I said, "In

order to protect you against any loss in this matter I want to put this contract and money in the bank to hold until you get your abstract.

Q. That it would be the only payment until satisfactory abstracts were furnished?

A. No, we accepted the money as first payment on the land.

Q. Did he intend to pay you that money irrespective of your title?

A. Yes sir he did.

44 Q. Then if the title was to prove no good, or you couldn't give possession he had to lose ten thousand dollars?

A. He didn't mention that at all, I mentioned that myself.

Q. You were Mrs. Owens' agent?

A. Yes sir.

Q. You represented to him that in case the title wasn't good he was to have his money back?

A. Yes sir.

Q. It was to be taken up from the bank?

A. There wasn't one word mentioned about the bank in the deal.

Mr. DUNN: These representations as to the tender of this money I think would be governed by the contract, written contract—that is, at the time the contract was reduced to writing and signed.

COURT: Does the contract recite the payment of money?

WITNESS: Yes sir.

Mr. LUND: The contract would be the best evidence as to what this payment was intended to be for.

(Mr. Dunn reads portion of contract in regard to payment of money.)

Mr. REID: Farther on in the contract—that abstract of title is to be furnished and submitted to the attorney—the contract shows on its face that it was intended that the title should be approved before any payment was considered.

COURT: I understood the witness to testify that this ten thousand dollars payment was to be paid back if the title wasn't good. (To witness.) Is that your testimony?

A. Yes sir. Never said it was to be paid back, but that is the reason I said to him, to put this money in the bank to hold it until he got title and an abstract and deed.

COURT: I will let the testimony stand.

Mr. REID: We move to strike from the record the testimony of the witness relative to furnishing an abstract—the abstract

45 would be the best evidence of what was furnished—and would ask plaintiff to produce that abstract.

COURT: As to whether it was a proper abstract it would be the best evidence, but as to the physical fact of furnishing an abstract without reference to its quality, is allowed to stand. The demand on the other side will be noted and I assume will be complied with?

Mr. DUNN: I will furnish you a copy of it—we haven't the abstract itself but we can furnish you a copy of it. It is in Ohio.

COURT: Was it returned to the Insurance Company?

Mr. DUNN: Yes sir.

Mr. REID:

Q. Mr. Davisson, did you ever furnish Mr. Berryman with a complete abstract of title to this land?

A. We furnished him with an abstract of title that the Union Central Life Insurance held.

Q. That was not such an abstract that he could take and own as his abstract?

A. No, it was part of the loan—they had made a mortgage and he understood that the abstract was held by the Union Central Life Insurance Co. at the time the deal was made, and until the $10,000 was paid they held the abstract.

Mr. REID: We ask to have that stricken—what he said would not be evidence as against what the contract calls for.

COURT: The question is whether the abstract was a complete one—this part, what was understood, is not responsive and is stricken out.

Mr. REID:

Q. Then it is a fact that you never turned over to Mr. Berryman any abstract which he might have as his own?

A. Having purchased this property we furnished him an abstract of title to the property.

Q. That doesn't answer my question—that was a borrowed abstract from the insurance company?

46 A. I suppose it was the abstract held by them.

Q. One of the considerations of this contract provided that this deed should be given by Mrs. Owens, with general covenants of warranty; was a warranty deed by Mrs. Owens ever furnished or tendered Mr. Berryman?

A. No.

Q. Was it ever tendered?

A. No.

Q. Under the conditions of paragraph 3 of the contract, that such warranty deed should be furnished before the 10th day of September—I understand you to state that Mrs. Owens didn't carry out that portion of the contract in furnishing a warranty deed?

A. No, that was waived when we extended the time in which to get the order of court.

Mr. REID: We object to that as conclusive.

COURT: I think your question before that called for a conclusion of the witness—he said there was no deed furnished as provided by the contract—if one goes in the other may—I will let the latter answer stand.

(Exception by Mr. Reid.)

Mr. REID:

Q. How was that waived by him in what manner?

A. Mrs. Owens told him when he bought the property she would get the other executors to sign a deed—she supposed she could get it back by the 10th.

Q. Do you claim that that was waived by reason of the agreement to waive it?

A. No.

Mr. REID: We object to what was said—any parole testimony of the deed—unless it was contemporaneous with making of the contract in which event it would have merged into the deed.

COURT: The court will receive it; he said it was apparently at the time. (Addressing witness) This alleged waiver you
47 refer to was at the time the contract was signed.

A. No it was later—on the 8th day of September.

COURT: I will permit that.

WITNESS: On the 8th day of September Mrs. Owens was making an executors' deed; he objected to it—said he wanted an order of Court.

Mr. REID:

Q. In the fifth paragraph of this contract, it is provided that the property shall be clear of incumbrance except the $10,000 mortgage, including the taxes for the current year. I will ask you to state if the property was clear, if you know, of all incumbrance, except that mortgage?

Mr. DUNN: If your Honor please, we object to that for the reason it calls for an opinion of the witness without laying any predicate as to whether he has any knowledge of the fact, and also it would not be the best evidence—any incumbrance would be in writing and of record.

COURT: He may be allowed to state.

A. So far as I know it was clear of all incumbrance except the ten thousand dollar mortgage.

Mr. REID:

Q. Don't you know it to be a fact that there was a lease out on this property to one Mr. Donahue which was of record.

A. I do.

Q. And when did that lease expire?

A. At the time the sale was made.

Q. How about the possession of the land?

A. He agreed to give it and did.

Q. Isn't it a fact that he refused to give possession, without a consideration of some nine hundred dollars, to one Mr. Huey about that time?

A. He did not.

Q. How do you know he didn't?

A. Mr. Donahue told me that Mrs. Owens asked him to give possession of the property on the 10th, and she was preparing to move to town and she moved to town, and Mr. Berryman employed him to go ahead with the next crop of hay—he took it for
48 granted he was to have half for taking care of the crop—they entered into a contract to that effect.

Q. Does that lease show upon the abstract you furnished?

A. Not that I know of.

Q. It doesn't show upon that?

A. I don't know.

Q. I believe you have said that this lease provided that it should be terminated upon the sale of the premises?

A. I didn't have reference to the lease when I said that Mr. Donahue told me he would give possession at any time Mrs. Owens requested him to.

Q. Was there any consideration paid by you or Mr. Berryman to the bank at any time that you know of for their having taken these papers and held them?

A. Outside of the money that I put there in the bank do you mean?

Q. No, I mean any consideration paid the bank for them taking the papers, the check and the contract and holding them there to await the termination of this deal?

A. No sir, not that I know of.

Q. Did the bank ever give you any written account of the expense of handling this check etc.

A. No sir.

Mr. REID: That is all for the present if the Court please.

Cross-examination by Mr. GIBBANY:

Q. At the time you speak of, when Mr. Berryman returned the abstract to Mr. Herbst, what if anything did he say about any requirements that he had made about the title?

Mr. REID: Objected to as hearsay, and verbal conversation as to change of terms of the contract.

Mr. GIBBANY: That is the only way by which we can raise the question of verbal requirements.

Mr. REID: Unless the bank knew of the terms to change the written contract it would not be competent.

49 Mr. LUND: I want to add another objection; that any oral statements of any of the parties to this action, or parties to this contract, without the bank was present, or some representative of the bank was present, is wholly inadmissible as to the bank.

Mr. GIBBANY: That is a pretty broad statement—the fact is if this bank occupied any position it was as agent of one or both these parties.

Mr. LUND: Counsel for plaintiff predicates his action against the bank on the proposition that this contract was made a part of the escrow as and held by the bank—that the bank was bound by the terms of this contract to preserve and hold it with authority to control the money and the disposition of it.

Mr. DUNN: The claim here presented is that Mr. Davisson notified Mr. Jaffa—the testimony shows that he notified Mr. Jaffa that the time be extended in order to procure this order of court, we expect to have testimony along the same line showing that the bank had notice of the change of the contract.

COURT: I will take this testimony—I would like to have the facts

fully—there may be come question of law but I would like the facts fully.

Mr. LUND: I think it would be well to have a general understanding that where objections are overruled to this class of testimony we should have an exception noted without raising it each time.

COURT: It being a matter before the Court I will permit that; if an exception is necessary in the case before the court it will be considered as noted.

(Last question read.)

A. Didn't say anything about the title at that time.

Mr. GIBBANY:

Q. What if anything was said about the order of sale by the Court?

A. Mr. Berryman came out about 30 minutes after that—
50 I was going down the street about 30 minutes afterwards I was going down the street, and he told me his attorney demanded an order of court.

Q. Did he tell you what kind of an order of court—order of sale or otherwise?

Mr. LUND: We object to this as hearsay.

COURT: He has already testified that his attorney wanted him to get an order of court perfecting title.

A. He wanted an order of court in order to perfect title.

Mr. GIBBANY:

Q. Order of court to perfect title or order of sale?

A. Order to perfect title.

Q. Did he ask for another abstract?

A. He didn't.

Mr. GIBBANY: That is all for the present:

Court adjourned until 2 o'clock p. m.

(At 2 p. m. court convened pursuant to adjournment.)

Redirect examination by Mr. DUNN:

Q. I believe you stated this morning that the abstract that was in the hands of the *United* Central Life Insurance Company, was submitted to Mr. Berryman and returned to Mr. Herbst, agent for the company, here?

A. Yes sir.

Q. State to the court whether any arrangement was made with Mr. Berryman as to having a copy of that abstract for his own use?

A. There was—I told him I would make him a copy, and that after that when the supplemental abstract was completed we would attach it to that one.

Q. Did you have a copy of that abstract made?

A. I did.

Q. State whether or not that is it? (hands witness paper.)

A. It was—it is.

51 Q. State whether or not anything was said about bringing this abstract down to date?

A. There was—Mr. Berryman, I told him we would have the will, a copy of the will put in this, and he said no we needn't complete it until we got this order of court for sale. Then we would have it all attached to that abstract.

Q. All proceedings subsequent to this were to be attached after the order for sale was procured?

A. Yes sir.

Witness excused.

ED. S. GIBBANY, a witness produced and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. DUNN:

Q. What is your occupation?

A. I am a practicing lawyer and connected with the Title & Trust Company.

Q. Were you engaged in the practice of law in the summer and fall of 1908?

A. Yes sir.

Q. At what point?

A. Roswell, New Mexico.

Q. Are you acquainted with the defendant Etta Owens?

A. Yes sir.

Q. Were you acquainted with one C. C. Berryman who was here during that time?

A. Yes I know Mr. Berryman—I was introduced to him first by Mr. Davisson, and met him several times afterwards.

Q. In what business connection if any did you first meet Mr. Berryman?

A. Well I think Mr. Davisson first introduced me to him as the purchaser or intending purchaser of the Owens farm and I met him in my office several times after that.

Q. Were you or not acting in any capacity for Mrs. Owens or the Owens estate at that time.

A. Shortly after the making of this contract between Mr. Berryman and Mrs. Owens, or the Owens estate, I was—I was acting for the executors.

Q. For what purpose?

52 A. The employment first came up, Mr. Dunn, in connection with some bonds that Mr. Huey, father-in-law of Mr. Berryman, was seeking to have transferred to Mrs. Owens or to the estate and in a way was a general employment for everything connected with the matter.

Q. Did you have any conversation with Mr. Berryman after the execution of this contract, attached to the complaint as exhibit A, with respect to the title of the property described in that exhibit?

A. Yes sir, I did.

Q. At what time was that if you remember?

A. I can't fix the date, Mr. Dunn, at which the first conversation arose—all I remember, of him coming and telling what he said about showing the abstract of title to the Owens place to Mr. Herbst, whose office is just adjoining mine, and I asked him if he found the title all right, and if there were any requirements; He knew at that time that I was representing the estate, and he answered me that there were no requirements except that they did want an order of sale of the district court for the executors to make the deed.

Q. Was anybody present when that conversation occurred?

A. Mr. Jeff D. Bell was in the office and heard the conversation I am pretty sure.

Q. What else was said during that conversation?

A. I told him that would take a little time, and then he either went out to meet Mr. Davisson—or directly after he and Davisson came back to the office and the question was again raised about this order of sale, and he wanted possession of the property he was buying from the estate and I told him and I told Mr. Davisson I expected they had better have Mrs. Owens come in and I think she came in that afternoon, I am not right positive about it because I didn't keep any exact memoranda of the time, and in the afternoon Mrs. Owens and Solon M. Owens, Mr. Berryman and I think
53 Mr. Davisson came back into the office and the question was again raised about the order of sale, and Mrs. Owens after talking to me privately about the matter, told me to advise him, and I did, in her presence, that if the time were extended in the contract so she would have to obtain an order of sale from the district court, she would give him possession immediately, or within the next day or two.

Q. During that conversation that you are talking about there, state whether or not Berryman said anything about wanting immediate possession?

A. Yes sir, he said, he had said in the forenoon I think when he was in there with Davisson he would like to have possession if there was to be any delay, and when he came in that afternoon—that his family was at the hotel and he was at considerable expense, and he asked me how long it would take—I couldn't tell him just at that time because I didn't know which of the heirs or the children of Mrs. Owens were in the Territory.

Q. What did you tell him about the time if anything?

A. I told him it would take from thirty to forty days and he said that would be——

Mr. Reid: We object to what he and all this conversation about extending the time of the contract,—not permissible on the ground that it was an attempt to vary the terms of a written contract, which is required by the statute of frauds to be in writing.

Court: Objection overruled.

A. (Witness.) He said that he wanted if he could obtain possession of the farm and stop his board bill, and I think it was finally arranged that he was to have possession the next day.

Q. Was Mrs. Owens living on the place at that time?
A. Yes, and had been for sometime.
Q. Do you know whether or not she moved off the place?
54 A. She did—the reason I know that, Mr. Bell, of my office, went and rented a house which she moved into the next day.
Q. Do you know whether or not Mr. Berryman moved onto the Owens farm?
A. Only indirectly—I don't know it as a matter of fact.

COURT:

Q. When was it you told him about this thirty or forty days—that afternoon or previously?
A. That afternoon, and possibly—I remember distinctly, if the court please, of telling him that afternoon as to the time because I remember asking Mrs. Owens about where her children were so I could obtain service upon them.

Mr. DUNN:

Q. As Mrs. Owens' attorney, or as attorney for the executors of the estate of Solon B. Owens, deceased, did you take any steps toward procuring an order of court authorizing the executors to sell this property?

Mr. LUND: We object to the question as leading.
COURT: He may answer.
Mr. LUND: Exception.

A. Yes I filed pleadings asking for such an order just as quickly as they could be prepared, and wrote a telegram for Mrs. Owens to her son in Texas, a minor son who was down there, so he could come here and be served immediately—and had service on the others—all the parties, and as soon as the time had elapsed I obtained such an order.
Q. Where was the presiding judge of the court at the time you obtained this order?
A. He was at Portales.
Q. Did you go there?
A. Went there and took witness for this order—in Portales.
Q. Do you remember any other conversation which you had with Berryman with reference to this transaction besides the one you have testified to?
55 A. I doubtless did have other conversation Mr. Dunn, and I remember of meeting him at the Citizens National Bank after that.
Q. I was coming to that. I will ask you if you had and conversation with the Citizens National Bank or any officer thereof, with respect to the deposit specified in this contract?
A. I did.
Q. At what time was that?
A. Well it was shortly after the time, or about the time that Mr. Berryman served the notice on me, or on Mrs. Owens that he was intending to abandon the purchase or stop the purchase of the farm.

Q. Who was present at this conversation?

A. Someone from the bank asked me to come down to the Citizens National Bank, over the 'phone and I went down and walked in—went into the cashier's office—I think Captain Poe, Captain Reid, Mr. Lund, Mr. Berryman, and I think Mr. Jaffa cashier of the Citizens National Bank.

Q. To refresh your memory as to the date of this conversation, this notice is dated the 21st day of September, 1908, was it along within a day or two of that time?

A. Yes, near that date.

Q. State to the court fully what occurred there at that time.

A. I think the conversation was begun either by Captain Poe, and, my recollection is that it was at Captain Poe's suggestion to me that Berryman was demanding the payment of the money to him, that was deposited there under this contract with Mrs. Owens or with the Owens estate, and that he had called me down to see what I had to say about it. I am not sure whether Mr. Jaffa said anything about it at the time or not; I understood from the way the question was put and the appearance of the gentlemen around me, it was my time to say what was to be said for the estate at that time, and I told them that Mrs. Owens would certainly object
56 to the payment of that money—that her position was that it was her money paid as a part of the purchase money, and then one of the men present, Captain Reid or Mr. Lund, suggested to me that the conveyance had not been made on the 10th day of September, when it was to have been made, and I told them that that was true, but that the reason it was not made on that day was that Mr. Berryman had made a requirement on the abstract or on the title.

Mr. Reid: I object—I don't think that is relevant.

Court: This is what you told them you say?

A. That is the substance of it.

Court: You may proceed.

Witness: Of course I can't remember the exact words—and that he had agreed to extend the time from the 10th of September until the order of court could be made—that this was done at his suggestion, and we had delivered him possession of the Owens farm upon that understanding—Mr. Berryman was sitting just at my side—and that we were doing everything in our power, and just as quickly as the time elapsed as required by statute we would have an order of court and we expected to make conveyance to him just when he had required it and that we were therefore objecting to the bank or anyone else taking charge of this money; that I regarded it as belonging to the Owen estate.

Q. Is that all that occurred there, in substance?

A. That is the substance—there was some little argument between Captain Reid and Mr. Lund and myself, about my position on those points, and some one,—Captain Poe, I believe, expressed some surprise that there had been anything said about an extension of time—but that was the substance of it.

COURT: Had the money been paid at that time?

A. They said he was then demanding, if the court please, that they should pay him the money—I understood it had not been paid.

57 Cross-examination.

Mr. LUND:

Q. You have spoken of Mr. Huey and Mr. Berryman—do you know each of those parties personally?

A. Yes sir.

Q. Do you remember when Mr. Huey came to your office, as described?

A. I don't remember when he was there the first time—he was in the office several times, but I don't remember when he came there first—I don't think I could fix the date.

Q. You know those two gentlemen apart pretty well do you?

A. Yes sir.

Q. Wasn't it Mr. Huey that had the conversation with you about this matter of the court's order?

A. No sir.

Mr. LUND: We would like to read the deposition of these parties, if the court please, where Mr. Huey says in his deposition—I think you have read it haven't you——

COURT: I glanced over it——

Mr. LUND:

Q. Where Mr. Huey says he was the party who had the conversation in your office, about the bonds and extension of time on his proposition. Is he correct or incorrect?

A. I don't know what he says—I can't tell from your question.

Q. He says he made the proposition for the purchase after he came upon the scene?

Mr. DUNN: I think we will object to that manner of cross examination as improper cross examination.

COURT: He may answer.

Mr. LUND:

Q. He says that about Sept. 4, he arrived in Roswell and made a proposition of purchase of this same property known as the
58 Owens farm, then in further elucidation of this he speaks of having a conversation with you and Mrs. Owens with reference to acquiring title through the decree of the district court or such court as would have jurisdiction—do you remember that conversation with Mr. Huey?

A. Mr. Huey was in there with Mr. Berryman and we had a conversation but there was never a word said in my presence about Mr. Huey buying this farm—he was trying to obtain Mrs. Owens' consent to apply these bonds on the Berryman contract.

Q. How do you know that?

A. Because that is what he said to me—told me all—described the bonds, went into detail.

Q. How do you know that was the proposition he had in view?

A. He said so, that is all I know.

Q. Did you think he had been trying to get Mrs. Owens to accept as payment these bonds?

A. Yes. He says "I am too old a man to sign mortgages and if Mr. Berryman goes through with this I will have to either sign or pay the debt," and went on to say that he had had enough experience in making debts and paying debts, and talked with me, in Mrs. Owens' presence about accepting these bonds upon this Berryman contract I remember that very distinctly, but there never was anything said about Mr. Huey making an independent purchase of the property.

Q. You are positive about that?

A. Yes sir, I am quite positive—because it was a matter I worked on, and when it was first brought to my attention I went into detail in the matters with him and he told me what the bonds were and how they were secured, and I finally said to him that Mrs. Owens was selling the property for the purpose of paying some debts on a Texas property which her husband had purchased shortly before his death, that they had—due to Cole & McKinnon.

59 Mr. LUND: I don't believe you need relate that.

A. I was telling you why I remembered so distinctly the transaction.

Q. You have said Mr. Berryman talked with you—was there anybody present there on behalf of the bank?

A. Not at the time they agreed to give Mr. Berryman possession of the farm—if there was I don't know it.

Q. When did you talk about extending the time, as you say, 30 or 40 days, who was present at that conversation?

A. Mr. Davisson, Mrs. Owens, young Mr. Sol. Owens and Mr. Jeff Bell in my office.

Q. Was that all?

A. I am not sure whether Mr. Huey was there or not—he may have been—the conversation was entirely with Berryman as I remember it, they were in and out several times, I can't fix just the times when they were singly or together.

Q. You speak of Mr. Berryman getting possession—will you tell us Mr. Gibbany what you know of your own knowledge—as a lawyer you can distinguish well between hearsay and knowledge—did you go out with Huey or with Berryman at any time to this farm?

A. No I did not.

Q. Were they in actual possession of the property?

A. I don't know.

Q. You, of your own knowledge, know nothing about that?

A. That is what I said—I didn't know directly.

Q. What do you know about a lease made by the last Solon Owens?

A. I drew a lease—as to the details I don't remember—my recollection is however, that the lease had expired before this time.

Q. Do you know of your own knowledge who had been farming the land during that season?

60 Q. Will you kindly look at that and say what it is? (Handing witness paper.)

A. That is the lease that was made between Solon B. Owens and Rufus A. Donahue. I think it was made in my office.

Q. Will you give us the date and the term?

A. Well the date of the lease——

Mr. DUNN: If the court please we object to the last question; if they wish to prove the contents of the instrument I would like to have it.

COURT: I think the lease would be the best evidence.

Mr. DUNN: I think this date—he said he thought had elapsed.

COURT: You may ask him to refer to the lease.

WITNESS: I don't know sir, whether it had expired or not.

Mr. LUND:

Q. Do you know of your own knowledge anything about whether Mr. Donahue at that time was in possession and use of this property?

A. I understood—well no sir I don't know—I had seen Mr. Donahue on the farm that season—I think I had been down there perhaps once or twice—I don't know whether I met him or not.

Q. Do you know of your own knowledge whether Mr. Berryman went out there to this property?

A. I don't know Mr. Lund, I didn't go out there to see whether he had gone or not, I didn't see him there at all.

Q. As a matter of fact you only know what transpired there in your office?

A. That is all I say—I might know more but whether it is admissible or not is another question.

Q. Do you know anything about any writing placed with the bank as a stipulation, in escrow, at the time this escrow was created?

A. I didn't know anything about it until afterward; I knew it was in the bank—saw Mr. Jaffa and talked to him about it and then Mrs. Owens came in and employed me in the matter.

61 Q. You were not present?

A. I didn't know who went down to the bank—I know of it.

Q. You were in the relation of a retained attorney to Mrs. Owens at the time that contract was made on the 21st day of August, I believe?

A. I am not sure about that.

Q. Did you have anything to do with drawing the contract between Mr. Davisson, Mrs. Owens and Mr. Berryman?

A. No.

Witness excused.

Mrs. ETTA OWENS, a witness produced and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. DUNN:

Q. You are one of the defendants in this suit are you?

A. Yes sir.

Q. Did you ever meet Mr. C. C. Berryman?
A. Yes sir.
Q. Were you present at the time this contract was executed by Mr. Davisson as your agent and Mr. Berryman for the sale of the Owens farm?
A. Yes sir.
Q. Where was that contract executed?
A. In Mr. Davisson's office.
Q. Here in Roswell?
A. Yes sir.
Q. Did you see a certain check drawn by Berryman at that time?
A. Yes sir.
Q. Do you remember the amount of the check?
A. It was nine thousand and something—I don't remember just exactly what it was.
Q. What was done with the check after it was drawn?
A. Mr. Davisson carried it to the Citizens National Bank.
Q. Did you examine it?
A. No, I looked at the check when he brought it to me
62 at his office.
Q. Did you go with Mr. Davisson to the bank?
A. Yes sir.
Q. Who else?
A. Mr. Davisson and my son Solon Owens.
Q. Who did you see after you got to the bank?
A. I don't remember seeing anyone but Mr. Jaffa.
Q. What occurred there between Mr. Jaffa and any of those present?
A. Mr. Davisson gave him the envelope that contained the contract and the check in it, and then he and Mr. Berryman talked to Mr. Jaffa—I didn't hear their conversation—we stayed back, and my son and I didn't hear what was said.
Q. Did you hear anything that was said by Mr. Davisson when he delivered the envelope containing——
A. Just told him what it was—that it was a contract and check between Mr. Berryman and I.
Q. You didn't hear the balance of the conversation if there was any?
A. No I didn't hear it.
Q. After that what did you do if anything toward carrying out the terms of that contract?
A. I tried to do everything I could—I tried to carry it out.
Q. Did you furnish him with any abstract?
A. Yes sir.
Q. When was that?
A. I don't remember the date. I know we got him an abstract.
Q. Did you deliver it to him?
A. I didn't but Mr. Davisson—I mean—I can't remember his name—the gentleman that give it to him.
Q. Did you have anything to do with sending for the abstract?

A. I put up twenty-five dollars to stand good for it that it would be returned just like we got it.

Q. Who with?

A. Mr. Herbst.

63 Q. Did you have any conversation with Mr. Berryman after he had been furnished with this abstract?

A. No, I don't believe I did.

Q. Were you present at any time when he conversed with Mr. Gibbany or Mr. Davisson about it?

A. I think I was in the office one time at the same time—in Mr. Gibbany's office.

Q. When was that?

A. I don't remember.

Q. That was before or after Sept. 10, 1908?

A. It was before.

Q. Was it shortly after or sometime before?

A. I don't know—about the first, somewhere along there.

Q. Who was present at that time?

A. Mr. Gibbany, Mr. Davisson, Mr. Berryman—I don't remember whether my son was with me or not—I believe he was.

Q. What was said at that time between the different parties?

A. I don't know what was said.

Q. Was anything said about Berryman taking possession of your farm?

A. Yes sir, he said he wanted to take possession if I would give him possession, and it would be all right for us to go on and get the order of sale, order of court for sale.

Q. Did you state to him at that time anything about the title to the property?

A. We told him—I told him at the start we could give a good title the executors could sign and give him a deed.

Q. How long after you had this conversation there in Mr. Gibbany's office before you took any steps to procure an order of court authorizing a sale of this property by the executors?

A. Mr. Gibbany went right to work to get the order.

Q. Were you living on the farm at that time?

A. Yes sir.

Q. State whether or not you moved off of it?

64 A. Yes sir I moved the 10th day of September.

Q. For what purpose?

A. To give Mr. Berryman possession.

Q. State whether or not he moved on the place?

A. Yes sir, he moved on it.

Q. How long did he stay there?

A. Stayed there 12 days.

Q. Stay there till the 22nd of September?

A. Yes sir.

Q. Did you have any other conversation with him about it?

A. No, I didn't see him, for he moved to the farm and I moved to town.

Q. Did you move your household goods into town?

A. No, we rented a house furnished—Mr. Berryman was to get the house furnished so I didn't have anything to move.

Q. How long did you live in town?

A. Lacked two days of being a month—moved in the tenth of Sept. and moved out the 8th of October.

Q. State to the Court whether or not you were at all times willing to carry out this contract with Mr. Berryman?

Mr. LUND: We object to that—we think it incompetent and irrelevant.

COURT: She may answer.

A. I tried to carry out everything that was in the contract.

Q. You employed Mr. Gibbany to obtain this order of court?

A. Yes sir.

Q. State whether or not you were involved in any expense by reason of carrying out this contract with Mr. Berryman.

A. Yes sir, I had to rent a place in town—then we had to go to Portales to get the order of Court.

Q. Have to pay your attorney for this proceeding?

A. Yes sir had to pay him for getting the order.

Q. Did you have any other reason for procuring this order
65 of sale besides this agreement you had with Berryman?

A. No.

Cross-examination by Mr. GIBBANY:

Q. Do you remember going down to the Citizens National Bank about this same matter about the time Mr. Berryman moved on your farm?

A. Yes sir.

Q. State who you went with and who you saw down there?

A. Mr. Jaffa found me on the street and I went down with him and Mr. Poe.

Q. Had you been served with this copy of this writing by Mr. Berryman at that time.

A. It wasn't served on me. I think they gave it to you; didn't bring it to me personally.

Q. What if anything did the bank or any officer there say to you about this deposit made by you and Mr. Berryman or by Mr. Davisson for you?

Mr. LUND: Reference has been had two or three times between this lady and counsel, to the first contract—I have been expecting that the original contract would be presented and I don't believe that it has been done—she is testifying about a contract and no paper is offered to establish its identity.

Mr. DUNN: It is the copy attached to the complaint—it isn't contended that it wasn't the contract.

COURT: If the contract is pleaded and stands admitted it may be admitted.

A. Mr. Poe said Mr. Berryman had demanded the money and he was afraid they would get in a lawsuit over it, and asked me if I would help pay the costs if they got in a lawsuit and Mr. Berryman

sued the bank for the money and I told them I would leave it to Mr. Gibbany, whatever he said.

Mr. LUND:

Q. Do you remember when and where you first met Mr. Berryman?

A. At Mr. Davisson's over at the office—that was in August sometime, I don't remember the date exactly.

66

Q. You don't know what day of the month of August?

A. No, sir—it was several days before he said he would take the place.

Q. Did you have any conversation personally with Mr. Berryman antecedent to this contract you have spoken of—before signing the contract did you see and talk with Mr. Berryman about the property at any time.

A. Yes sir. First out the place there I had a talk with him about how the title was.

Q. Were you present at any conversation had between Mr. Berryman and Mr. Davisson, the plaintiff, before the signing, before you signed this contract?

A. Yes, we talked several times out to the place, Mr. Davisson, Mr. Berryman and myself.

Q. Did you give to Mr. Berryman at any time or do you know of there having been given to him an abstract of the water right, as to the title to the water right?

A. I supposed it was in the abstract I don't know.

Q. Did you examine the abstract yourself?

A. No sir.

Q. Do you know what it contained?

A. No sir.

Q. You don't know as a matter of fact then, whether or not it covered that branch in the history of the title, to the water right?

A. No sir.

Q. What water right had you if you know?

Mr. DUNN: We object to that—in the first place not proper cross-examination—in the second place not proper evidence of title, it would be a mere opinion of the witness; and in the third place the negotiations had before the contract was executed were merged in the contract.

Mr. LUND: If your Honor will recall the complaint and the contract were predicated largely upon selling the water right to this land; the condition of the water and the water right is one of the reasons why Mr. Berryman, it seems abandoned the matter, as it will more fully appear—we think the abstract ought to be here—I think we ought to have an insight to it.

67

COURT: I understand we have a copy in court.

Mr. LUND: I have never seen anything that pretended to be an abstract.

COURT: I think you demanded an abstract here this morning and they said they had a copy here for tender—the original being with the Insurance company. The water right in itself would be

a matter of record—or a matter of writing at any rate—I don't think you can prove that by cross examination and I doubt if it is proper cross examination. I will sustain the objection.

Mr. LUND:

Q. You saw the abstract that was delivered to Mr. Berryman then did you Mrs. Owens?

A. No sir.

Q. Did you see it delivered?

A. No sir.

Q. How then can you say it was delivered?

A. I got my check back when the abstract went back and they said it had been delivered.

Q. You continued, did you, in partial possession of this property, of these lands and premises after the death of your late husband, you and your family remained living there?

A. Yes sir.

Q. And you lived there, as I understood you a moment ago, until the 10th of September?

A. Yes sir.

Q. What part of these lands and premises did you actually have under your dominion and control, or use?

A. I had all the orchard, all but the alfalfa land.

Q. Did you ever see this lease?

A. Yes, I have read it several times.

Q. You know of it?

68 A. Yes sir.

Q. Did you know this lease was in existence at the time you entered into the contract with Mr. Berryman?

A. Yes sir.

Q. Do you know that after Mr. Berryman attempted to get possession of the property, or about that time, do you know from any source what attitude Mr. Donahue took toward the matter of giving possession to Mr. Berryman?

A. Mr. Donahue told me he was ready to give possession at any time?

Q. When did he tell you that?

A. When I sold the place—He told me before I sold that he would give possession any time I sold.

Q. What do you mean by selling the place?

A. I supposed we had sold it to Mr. Berryman.

Q. You mean at the time you signed the contract?

A. Yes sir.

Q. Do you know anything about what Mr. Donahue said to these people when they went out to the farm?

A. No sir.

Q. Do you know whether he was willing or not to give them possession?

A. Just what he told me—he was willing at any time.

Q. Do you know what Berryman found when he went out there?

A. I don't know what he found.

Q. Isn't it a fact that, except for a small part of this land, something like a garden, lot for your cow, and your chickens, isn't it a fact that Mr. Donahue was in the use and possession of this place?

A. No sir, he didn't have anything to do with the orchards.

Q. How much in orchard?

A. There is 2 or 3 acres and 13 acres in orchard, and about 6 acres around the house.

69 Q. You say Mr. Donahue had no possession of that part?

A. No, he had nothing to do with that.

Q. Had he possession of any of the cultivated lands, plowed lands?

A. Yes, he was to get so much of the crops he put in.

Q. How much of this farm in alfalfa?

A. 220 acres.

Q. How much is there in the entire farm?

A. 360 acres.

Q. Wasn't there some pasture lands that wasn't under cultivation?

A. Yes sir.

Q. Do you know what quantity?

A. I don't know exactly—I think there is 40 acres maybe, not cultivated.

Q. Is that 40 acres low land?

A. Yes sir.

Q. That is part of the 360?

A. Yes sir.

Q. Isn't it a fact there was another 80 in addition to that, not cultivated?

A. Yes I think the east 80 is not all cultivated.

Q. Is any of it, if you know?

A. Yes, with alfalfa.

Q. Do you know how much of it is in alfalfa?

A. I don't know exactly, I think there is about 40 acres maybe more, then there is 13 acres of orchard, on that east 80.

Q. Isn't it true that was 80 acres that there was not water on, could have no cultivation?

A. It is not 80 acres that is not cultivated.

Q. Did you have water, Mrs. Owens, for this 80 acres you are speaking about?

A. I suppose so if we had wanted to water it.

Mr. DUNN: We move to suppress the interrogatory and answer—it don't make any difference what the witness had there and what she didn't have there. There is an executed contract—the party accepted the place and went into possession of it, and it don't matter what kind of representations were made to induce him to

70 make that trade, as suggested by counsel for the defendant bank any reason for any kind of representations, even if fraudulent would be no defense to the bank in this case. There is no proposition that is better settled in law and on which there is less conflict of authorities,—in the proposition that fraud is personal with the party and he is the only one that can set up and annul a contract for fraud; there is no use to go into this case and inquire into this water-right and inquire into the condition of the

farm—because this purchaser—the contract was executed and he went into possession of it and never came into court to ask an annulment of that contract.

COURT: I will let the testimony stand so far as it goes, but as I said, really I don't consider this cross examination.

Mr. LUND:

Q. What part of this farm, or this property did you put, if any, in the hands of Mr. Berryman?

A. I supposed I was putting all of it in his hands, turned it all over to him.

Q. You said—a moment ago you said Mr. Donahue had possession of the pasture land 220 acres of alfalfa?

A. He did, Yes.

Q. How did you put Mr. Berryman in possession of any part of that?

A. Mr. Donahue said he would give possession.

Q. I am asking you?

A. Well, of course I didn't I guess.

Q. Did you go out there with him?

A. No, I didn't go.

Q. Did any member of your family go?

A. I don't know whether they did or not.

Q. You didn't send anybody?

A. Yes sir my boys took him out there, hauled him out in the wagon that they brought us in here in.

Q. Do you know what your boys did or what they were to do in the way of giving possession?

A. They just took him out there—put his trunks out there.

71 Q. Did you have any conversation during the pendency of these matters, with Mr. Berryman? Did you have any conversation with Mr. Huey, the gentleman whom it was said was the father-in-law of Mr. Berryman?

A. Mr. Huey came out the 8th day of September.

Q. Do you remember talking with him about this place?

A. Not by ourselves—I talked with—Mr. Davisson, Mr. Berryman and myself talked together.

Q. Did you have any talk with Mr. Huey about the matter; of these bonds in payment of your land?

A. Mr. Davisson said Mr. Huey wanted to put bonds in on the place.

Q. Do you wish us to understand that you had during the pendency of these matters, entertained a proposition from Huey to buy these lands and pay for them in with these bonds.

A. He never said anything about it to me—only just Mr. Davisson.

Q. Did Mr. Davisson say anything to you about it?

A. He told me yes, Mr. Davisson told me.

Q. Did you authorize Mr. Davisson or give consent to Mr. Davisson to act in this matter with Mr. Huey?

A. About the bonds?

Q. Yes.

A. No sir, I didn't he was my agent to sell the place.
Q. What did you say to him if anything about those bonds?

Mr. DUNN: We object as not proper cross-examination,—hearsay.
COURT: She may answer.

A. I said I didn't know anything about it—I would see Mr. Gibbany.
Q. Did you authorize Mr. Gibbany to take any action in the matter?
A. I just went in and asked Mr. Gibbany if we should take the bonds—wanted his advice.
Q. What was done?
72 A. Mr. Gibbany said if we could use them for what we were owing on the Texas land we might take the bonds—we talked and he thought we would have to see if there would be a good deal of expense to it.
Q. Do you remember your visit to the bank, of which you have spoken—the Citizens National Bank, with Mr. Davisson, your agent, and Mr. Berryman?
A. The first time we went down there with the contract?
Q. Yes.
A. Yes sir.
Q. You were present?
A. Yes sir.
Q. You have spoken of Mr. Davisson handing some envelope—do you know what was in that envelope?
A. Yes sir.
Q. What was it?
A. The contract and the check.
Q. How do you know the check was in it?
A. I seen Mr. Davisson put the check in there.
Q. Didn't you tell us a moment ago that Mr. Berryman took the check to the bank?
A. No sir I didn't.
Q. I misunderstood you, I may be in error as to that. Did you take any part or have anything to do with giving instructions to Mr. Jaffa as to the holding of these papers?
A. No sir, just sat there—I didn't give any directions.
Q. Was there any direction given by anyone in your presence?
A. I don't know what Mr. Davisson told Mr. Jaffa—what they said.
Q. Don't you recall Mr. Jaffa taking a large envelope, putting these papers in it, and writing as was dictated to him by Mr. Berryman and Mr. Davisson, in your presence?
A. I knew he had them in a large envelope.
Q. Didn't you see him writing on that envelope as dicta-
73 tion was given to him?
A. I don't know—I don't remember.
Q. Did Mr. Jaffa read to you and the others what he had written?
A. No I think not. I don't remember of him reading anything.

Q. You wouldn't say that he didn't would you?
A. I am not positive.

Cross-examination by Mr. GIBBANY:

Q. When that conversation came up about the bonds, where was it?
A. Out at the place.
Q. Where was the last conversation had in your presence with Mr. Huey about those bonds?
A. I think that was the only time, out at the place that morning.
Q. Do you remember being in my office in which a conversation took place between Mr. Huey and myself about those bonds—do you remember that conversation?
A. Seems to me like I remember being in there when you all talked about it once, but I don't remember.
Q. Did you come into the office that afternoon after—or the next day after Mr. Huey and Mr. Davisson were out there about the bonds?
A. Yes, sir, I was in your office the next evening.
Q. Mr. Huey, in talking to you, was he seeking to get your consent to deliver these bonds to you in payment of the amount due from Mr. Berryman?
A. Yes, sir.

Mr. LUND: The question is improper, if your Honor please—leading question—calls for a conclusion.
COURT: The question was leading if it had been objected to.

Mr. GIBBANY:

Q. What was the subject of conversation in the office when you came in and Mr. Huey and Mr. Berryman were there, about these bonds—was that the discussion, of the same proposition?
A. Yes, sir.
74 Q. Did you ever hear anything at that time or about that time, from Mr. Huey, about making a purchase of that farm?
A. No, sir.
Q. Do you remember who else was present in the conversation in my office between Huey, Berryman, myself and yourself in the morning—who came with you if you remember?
A. I don't remember Mr. Gibbany, who come with me.
Q. Do you remember who was in the office?
A. No, sir, I don't.
Q. Do you remember whether Mr. Bell was there?
A. I believe Mr. Bell was there.
Q. Do you remember whether Mr. Davisson was there?
A. I think Mr. Davisson was there and Mr. Bell.
Q. Who, if any of your family came with you to the office?
A. I don't believe any of them was with me.

Recross-examination — Mr. LUND:

Q. Did you talk—after the visit you have described, to the bank, with the plaintiff Davisson and Berryman—did you have at any later time a conversation with Mr. Jaffa over this matter?

A. I don't remember only just that one time when I was at the bank with Mr. Jaffa and Mr. Poe.

Q. Did you have a talk with them at that or any other time about this escrow memoranda that Mr. Jaffa had taken and under which he held these papers.

A. I don't remember.

Q. Didn't Mr. Jaffa, at a subsequent visit, get this wrapper with these papers in it, and read to you what was written, what he had written and what was then in the bank, regarding this matter—don't you recall that?

A. No, sir—I don't recollect that—I don't remember—I was in there that evening. I don't remember whether Mr. Jaffa read to me?

Q. Did Mr. Poe tell you what it was?

75 A. No, Mr. Poe didn't.

Q. You say you have no recollection of having this read to you or of reading it yourself, this memoranda of escrow stipulation perhaps we better say?

A. I don't remember any memoranda at all on the envelope—may have been one but I don't recollect it—don't remember it.

Q. So far as this matter of sales or sales was concerned you seemed to have left it entirely to Mr. Davisson did you?

A. Yes, sir.

Mr. DUNN: We wish to offer in evidence certified copy of an order of sale, granted to the executors of the estate of Solon B. Owens, deceased, to sell the property in question.

Mr. LUND: We object to the introduction of this for the reason it is not geremane to the issues as between the bank and the plaintiff—in fact the contract had expired and the money had been paid by the bank to Mr. Berryman and we think it would be improper to admit it.

Mr. DUNN: I think it is admissible your Honor on the ground of showing diligence with which Mrs. Owens proceeded to carry out her part of this contract.

COURT: I think I will let it go in. What day was the order of sale filed?

Mr. DUNN: I don't know; it appears this agreement was made on the 8th day of Sept. and summons was on the 12th—must have been between the 8th and 12th.

(Certified copy of order of sale accepted in evidence and marked plaintiff Ex. B.)

(Witness excused.)

Mr. LUND: We desire to note an exception to the introduction of the exhibit.

J. D. BELL, a witness produced and sworn to testify on behalf of the plaintiff deposed as follows:

Direct by Mr. DUNN:

Q. State you- name?

A. J. D. Bell.

76 Q. Where do you live?
A. In Roswell, New Mexico.
Q. Where did you live in the summer and fall of 1908?
A. Roswell.
Q. What business were you engaged in?
A. Real Estate and abstract business.
Q. Are you acquainted with on- C. C. Berryman who was in Roswell along in the summer last year?
A. I am, I was introduced to him and met him afterwards.
Q. Do you know anything about a purported contract of sale between him and Mrs. Etta Owens?
A. Yes sir.
Q. I will ask you if you were present at any conversation occurring between Mr. Berryman and Mrs. Owens, or any of her agents, attorneys, with respect to this contract?
A. I was.

Mr. LUND: With respect to what contract if your Honor please?
Mr. DUNN: When was that conversation?
Mr. LUND: I object to the answer and asked that he be asked what contract he refers to.
COURT: What contract do you refer to?
WITNESS: The contract of sale entered into between Mrs. Owens and Mr. Berryman in which she offered to sell the farm down here.
Mr. DUNN: Was this conversation you refer to before or after that contract was represented to have been executed?
Mr. LUND: I object to that—there is no foundation laid for that—there is nothing to show that he saw it signed, or knows anything of his own knowledge.
COURT: They may be required to fix the time, and I think the circumstances of it being reported to him ought to be more fully developed.

Mr. DUNN:

Q. State the date of this conversation you refer to as near as you can Mr. Bell?
77 A. About the 8th day of September 8th, maybe it was the 7th—long about the 8th.
Q. Who was present when that conversation occurred?
A. Mr. Berryman and his father-in-law, George Davisson, Mrs. Owens, Mr. Gibbany, myself, and I believe Solon Owens.
Q. Just state to the court as near as you can what was said at that time by the parties?

Mr. REID: I object on the part of the bank, as hearsay, and an attempt to vary the terms of the contract with regard to the sale of real estate, by parole agreement.
COURT: He may answer.

A. I don't believe I was close enough where I could hear the first part of the conversation; I was at another desk; but Mr. Berryman said he had had the abstract examined and that he would want Mrs. Owens to have the court make an order of sale and approve the sale,

and with that he would be satisfied with the title, and wanted possession. I am not pretending to give this in the exact language which was used, only just as I remember the substance of the conversation.

Mr. DUNN:

Q. What if anything was said about giving possession?

A. Mrs. Owens said she would give him possession—she said she would give it to him if she could find a house to move into—she asked me if I had any houses to rent—I told her I did—told her what house it was, the location—she wanted to go and look at it; (I showed her the house; I stepped into the Western Grocery store to see L. P. Johnson, whose mother owned the property; Mrs. Owens made a deal with him to take the place and notified Mr. Berryman that she would move the next day.

Q. To refresh your memory I will ask you if Berryman gave any reason for wanting possession at that time?

A. I think he said that some friends or relatives were coming out, that they were stopping at the hotel on expense and he wanted
78 possession so when they visited him he could have plenty of room to take care of them—he wanted immediate possession.

Q. What if anything was said about obtaining this order of court and the time necessary to obtain it?

A. When Mr. Berryman told Mrs. Owens he wanted this order, she asked Mr. Gibbany when he could get it; Mr. Gibbany said it would take 30, perhaps forty days to get the order of sale, report of sale and order approving sale, and that he would go to work and get it through as soon as he could. Mr. Berryman said that would be perfectly satisfactory; he says "I will take possession if you say you will get those papers through" and Mr. Gibbany agreed to do that, and Mr. Berryman left the office with the understanding that that was to be done—that he was to go ahead and take possession of the farm.

Mr. DUNN: That is all.

Cross-examination by Mr. LUND:

Q. You have said that you didn't hear the conversation—the first part of it?

A. No sir I didn't hear just what was said at first.

Q. How was it then you heard so distinctly the other part, did you change your position?

A. Yes sir I was called into the conversation and for sometime we all talked together about the matter.

Q. Do you know what Mr. Berryman said?

A. I have repeated as nearly as I can remember what he said.

Q. Who called you into the conversation?

A. I believe Mr. Gibbany.

Q. Will you repeat to us just what Mr. Berryman said?

A. In reference to what?

Q. The subject you are talking about?

A. I am talking about being called into the conversation now.

79 Q. What did Mr. Berryman state about anything, in this conversation?

A. Mr. Berryman said he had the abstracts examined and that he had decided on advice from his attorneys that he wanted an order of sale and the sale approved by the District Court of Chaves County, and Mr. Gibbany says "we can get that for you all right"; he says "with that exception I am satisfied with the title; make me a supplemental abstract" from the date of the abstract he had in his possession, and which would be brought down to date later, showing the order of court, report, application and order of sale, and he wanted possession—was ready and wanted possession according to the contract.

Q. And that was on the 8th of September?

A. Yes sir.

Q. And you are sure Berryman made use of this language?

A. Yes sir.

Q. Did he say he wanted a supplemental abstract?

A. Yes sir.

Q. Didn't ask for any other abstract?

A. No.

Q. Did he ask for an abstract to the water right?

A. No sir.

Q. He didn't.

A. No sir.

Q. Did you hear any conversation in which Mr. Berryman was a party, with reference to this water right?

A. No sir.

Q. Are you sure that this talk about the court's order, securing the court's order of sale didn't come from Mr. Huey?

A. Possibly Mr. Huey, but I think Mr. Berryman—is was one of the two—they both took part in the conversation—first one and then the other would suggest—but I believe it was Mr. Berryman.

80 (At this point Mr. Lund objected to the last answer of witness—indicating at the same time that it was not necessary that it be recorded.)

Q. Would you say upon your oath that it was not Mr. Huey but Mr. Berryman that had this conversation?

A. Mr. Huey might have had something to say, but I talked personally with Mr. Berryman and agreed with him that I would furnish this supplemental abstract showing the orders of the court—I agreed with Mr. Berryman to do that.

Redirect by Mr. DUNN:

Q. Mr. Bell did you have any conversation at that time with Mr. Berryman about him going to take possession of this place?

A. Yes sir.

Q. What was said with regard to that?

A. He said there in the presence of us all that he wanted possession, wanted to move right away; then a little later I had a talk with him—my daughter was an applicant for assistant teacher in the

school at that time and she thought she was going to get the position—she had been intending to try and board with Mrs. Owens—I told Mr. Berryman and asked him if it would be satisfactory to board her during the term—he said it would suit him, that she would be company for his wife and would be glad to give her a room at his house that winter.

Mr. LUND: I move that that be stricken from the record it is not pertinent to the issues.

COURT: We will let it stand.

(Witness excused.)

R. J. DONAHUE, a witness produced and sworn on behalf of the plaintiff testified as follows:

Direct examination by Mr. DUNN:

Q. What are your initials?
A. R. J.
Q. Where do you live?
A. Roswell.
Q. Where did you live in 1908?
A. On the Owens farm.
Q. Did you meet one C. C. Berryman from Arkansas during 1908?
A. Yes sir.
81 Q. About what time?
A. I think it was along the last of August or September,—close to September.
Q. Where were you living at that time?
A. On the Owens farm.
Q. Did you have your family there?
A. Yes sir.
Q. State whether or not you ever had any conversation with Mr. Berryman about his taking possession of the farm? At any time?
A. Yes sir, I did.
Q. What was said in regard to that?
A. There wasn't anything said only he asked me about the possession and I told him I was ready to give possession at any time.
Q. Was that before September 10th?
A. I don't remember the date.
Q. Did Mr. Berryman ever move on the place?
A. Yes sir.
Q. Was this conversation before or after he moved there?
A. I think it was after he moved there.
Q. Did you have any contract or arrangement with Mr. Berryman after he moved, to work for him?
A. Yes sir.
Q. What was that?
A. It was to go along and handle the place for him same as I was handling it for Mrs. Owens.
Q. Did you have any business transactions with him?
A. Some.

Q. About the hay on the place?
A. Yes sir.
Q. State what that was?
A. I finished up the crop of hay I was working on when Mr. Berryman took charge and turned it into Jaffa-Prager, and they settled for the crop—Mr. Berryman received a check from Jaffa-Prager for his part of the hay?
Q. Did they deliver that to Mr. Berryman?
82 A. Yes sir. Jaffa-Prager delivered it to him—give him the check.
Q. Did you ever see that check any more after he got it?
A. Yes.
Q. About how long after?
A. It was several days after Mr. Berryman turned me back the check.
Q. Was that after he had left the place?
A. I think so. I am not positive.
Q. Do you know anything about him handling and selling any property on the place, while he was there?
A. He handled some apples, and some hogs there on the place?
Q. What did he do—buy or sell hogs?
A. Sold them.
Q. Buy or sell the apples?
A. Sold them.
Q. Did you ever raise any objection to Mr. Berryman's taking possession of that property?
A. No sir.

Cross-examination.

Mr. LUND:

Q. What property are you speaking of Mr. Donahue, in answer to the last question?
A. I am speaking of the Owens property.
Q. What did that consist of?
A. What do you mean?
Q. You are talking about giving possession, what do you mean, about this man coming out there—what were you in possession of and what did he have in his possession at any time, if he had anything?
A. I had a lease on the Owens farm.
Q. Look at that and see if that is the lease (handing witness paper). Look at these signatures and see if they are yours?
A. Yes sir.
Q. Were you in possession of this Owens farm under this lease?
A. Yes sir.
Q. Do you know when your lease expired?
83 A. It was to expire in January.
Q. January last?
A. Yes, January 1909.
Q. What part of that farm had you in your possession?

A. I had everything except the lawn, orchard, dwelling house, and the corrals and garden spot.

Q. Did you know when Mr. Berryman came out there? Were you present when he went out there?

A. I think I was.

Q. Did you see him unload?

A. Yes sir.

Q. What did he unload?

A. Unloaded trunks, boxes, one thing and another—I don't know exactly.

Q. Did he take them into the house or what did he do with them?

A. I don't know. The boxes were taken in—I think most of the things were taken in the house.

Q. Did you occupy any part of the house?

A. I did not.

Q. Where did you live?

A. In another house on the farm.

Q. He entered into possession of the house?

A. Yes sir.

Q. That was after Mrs. Owens had moved to town?

A. Yes.

Q. Did you relinquish to him at any time any part of the land you had been working or holding under this lease?

A. He never asked me for any relinquishment—we made a trade—I was to go ahead and handle it for him same as I had for Mr. Owens—that was the only proposition.

Q. What did you say to him if anything about relinquishing the property you had a lease on?

A. I didn't say anything at all; I told Mr. Berryman there was a little difference between Mrs. Owens and I, and that it could be settled at any time.

84 Q. Did you tell Mr. Berryman or Mr. Huey that you would relinquish possession of that property on payment of $900?

A. I don't think I did.

Q. When both Mr. Huey and Mr. Berryman in their testimony say that you did, what answer have you to make to that. Both these gentlemen in their testimony state that when they asked for possession of the farm you told them you had a lease, and that it was the first they had heard of it, and that you further stated to them that you could not give possession; and would not unless you were paid $900. Is that true? Or is it not true?

A. I don't think it is true.

Mr. DUNN: I object to that method of cross examination.

COURT: Ordinarily those are things for a jury—in a certain sense that form of question is a method of testing the strength of the witness' recollection, by calling to his attention the testimony of some other witness—I am not certain but the form is a useful one at times.

Mr. LUND:

Q. What was said by you to those men or either of them on that subject?

A. I don't remember just what was said in regard to that—there was—Mr. Berryman was figuring on my teams and some machinery, and I know I made Mr. Berryman a price on my teams and machinery—I don't recollect just what it was—he was figuring on taking them.

Q. Did you say anything to Mr. Berryman or to Mr. Huey as to what you considered to be your rights there under that lease, in the pasture land and the use of this land—I think you said there was another cutting of alfalfa after that?

A. I don't remember whether I made that statement about that or not.

Q. Did you tell them anything about the condition or the terms or the amount that you would require before you would give up possession?

A. I don't think I did.

85 Q. And on that day when they went out there you objected to giving them possession of the farm and said you intended to stay there?

A. No sir. Didn't tell them that.

Q. Didn't you say so to Mr. Berryman?

A. No. There wasn't anything brought up about that at all—my trade was to stand the same as it was with Mrs. Owens, I had no other arrangement to make, my trade arrangement was done made; my contract went on with them the same as with Mr. Owens—there was no further business about it—that was the trade we made.

Q. You didn't object you say to giving possession to those people and giving up the farm, you never raised any objection to doing that?

A. I don't think I did.

Q. You think you didn't?

A. No.

Q. Didn't ask any sum of money for relinquishing possession?

A. I don't think I did.

Q. Do you know that you didn't?

A. If there was anything said in regard to that I don't remember.

Q. Isn't it a fact that you held that property under this lease and it belonged to you at that time?

A. Yes I held my lease.

Q. Isn't it a fact also that you told those men so? And you were unwilling to relinquish possession unless somebody settled with you—Mrs. Owens or somebody else?

A. I do not think that I said anything about that.

Redirect examination.

Mr. DUNN:

Q. You testified in answer to the question, that this lease terminated on the first of January: I will ask if it didn't provide that the lease should be terminated at any time the property was sold?

A. It did, yes.

Mr. REID: I think, if the Court pleases, that the lease is
86 the best evidence; I don't think it states either one of those propositions.

COURT: I think both sides have gone into parol on the contents of instruments; if you wish to put it in on each side I will receive it.

Mr. LUND: We will file the lease at the proper time.

COURT: I will let the answer stand.

(Witness excused.)

ADA ANDERSON, a witness produced and sworn on behalf of the plaintiff testified as follows:

Direct by Mr. DUNN:

Q. State your name?
A. Ada Anderson.
Q. Where do you live?
A. Roswell, New Mexico.
Q. Where were you living in August 1908?
A. Roswell.
Q. What was your profession at that time?
A. I was Mr. Davisson's stenographer.
Q. Were you working for him as stenographer about August 21, 1908?
A. Yes sir.
Q. Do you remember about that time any papers being executed in Mr. Davisson's office between one C. C. Berryman and Mrs. Owens?
A. Yes sir.
Q. What papers were executed at that time?
A. There was a contract.
Q. Anything else?
A. There was a check written in the office.
Q. What was done with the check and contract?
A. After the contracts were written they were read and Mr. Davisson took the contracts and showed one to Mrs. Owens and they read it there and afterwards they were put in an envelope.
Q. State whether or not the check was put in the envelope?
A. To the best of my recollection it was.
Q. What was done by the parties after those papers were put in the envelope?
87 A. They said they would go to the bank and close the deal and they left the room.
Q. Who had the papers when they left the room?
A. Mr. Davisson had the envelope and put the contract and check in them and left the room—I think he had them when they left the room.

(No cross examination.)

(Witness excused.)

SOLON M. OWENS, a witness produced and sworn on behalf of plaintiff testified as follows:

Examined by Mr. DUNN:

Q. State your name?
A. Solon M. Owens.
Q. Where do you live?
A. Roswell.
Q. Were you living here in the summer and fall of 1908?
A. Yes.
Q. Are you acquainted with one C. C. Berryman?
A. Yes sir.
Q. When did you first meet him?
A. Sometime around the last of August 1908.
Q. Do you know the circumstances of a trade being made between him and your mother regarding the sale of your farm out here?
A. Yes sir.
Q. State whether or not you were present when that contract was executed?
A. I was.
Q. Where was it executed?
A. In Mr. Davisson's office.
Q. Who were present?
A. Mr. Davisson, Mr. Berryman, my mother, Miss Anderson.
Q. What papers were executed at that time?
A. The contract, and the check was written out there.
Q. Did you see the check?
A. I did.
Q. Do you remember the amount of it?
88 A. It was somewhere around nine thousand dollars, they had taken out the interest.
Q. What was done with the check?
A. Put in the Citizens National Bank.
Q. I mean there in the office.
A. It was put in with the contract in the envelope.
Q. Who had the check?
A. Mr. Davisson.
Q. Who signed it?
A. Mr. Berryman.
Q. Did Mr. Berryman or Mr. Davisson draw up the check, if you remember?
A. Mr. Berryman had the check, Mr. Davisson took it and showed it to us.
Q. After he had shown it to you what did he do with it—I mean there in the office?
A. And then he put it in the envelope with the contract.
Q. Who had possession of the envelope?
A. Mr. Davisson.
Q. You say you all went to the bank?
A. Yes sir.
Q. Who carried the envelope to the bank?

A. Mr. Davisson.
Q. What was done after you got to the bank?
A. We just turned it over to Mr. Jaffa.
Q. Who delivered it to him?
A. Mr. Davisson.
Q. What was said?
A. I don't remember what was said—I stood back I didn't go up very close.
Q. You didn't hear any conversation at the time?
A. I just heard them talking about what it was—contract and check.
Q. Did you hear anything said by Mr. Davisson when he delivered it?
A. I think so.
Q. What did he say?
A. He said the envelope contained a contract and check.
Q. Did he give Mr. Jaffa any instructions?
A. If he did I didn't hear him.
89 Q. Mr. Owens, after that date I will ask you if you were present at any conversation between Mr. Berryman and Mrs. Etta Owens, or between him and Mr. Gibbany, or between him and Mr. Davisson, that was about this transaction?
A. It was about the time when he moved, moved out, long about the time when he took possession.
Q. Where did that occur?
A. In Mr. Gibbany's office.
Q. Who was present?
A. Mr. Gibbany, Mr. Davisson, my mother and myself, and I believe Mr. Bell and Mr. Berryman.
Q. You are the son of the defendant Etta Owens are you?
A. Yes sir, I am.
Q. State what was said at that time as near as you can?
A. He wanted to take possession so he could stop the expense, he was staying at the hotel and wanted to stop the expense.
Q. Did he say anything about that?
A. About what?
Q. Didn't Mr. Berryman say anything about possession?
A. Yes he said he wanted to take possession of the place.
Q. What did he say about it? Repeat the substance of it if you can without giving your own conclusion?
A. I don't know just what he said.
Q. Can you state the substance of what he said about that?

Mr. LUND: He has stated twice if your Honor please that he couldn't state it.

COURT: If you remember anything that was said tell us—if you don't, so indicate.

A. I don't particularly remember anything that was said.

Mr. DUNN:

Q. By that answer do you mean you don't remember his exact words or don't remember the substance?

90 A. I remember something about it when he moved out to take possession of the place—I stopped and told him I would move him out the next day.

Q. Do you remember anything said at that time about obtaining an order of court permitting the sale of these premises?

A. Yes sir.

Mr. LUND: I object, if your Honor please, to that form of leading.

COURT: Objection sustained.

(Answer withdrawn.)

Mr. DUNN:

Q. State whether or not anything was said at that time with reference to the title to this property?

A. We told him we would give him a good title which the three executors had to sign.

Q. What if anything did he say to that?

A. He said afterwards he wanted an order of court.

Q. What did you answer, if anything about the order of Court?

A. We told him we would get an order of court.

Q. Did you have anything to do with moving him out there you say?

A. Yes sir.

Q. When was that?

A. That was the tenth—morning of the tenth of September, 1908.

Q. Did he go down there with you?

A. I didn't drive, no not the time he went down there, I went down a horseback and my brother took the wagon out with his trunks and things.

Q. How long did he stay there?

A. Twelve days, to Sept. 22.

Q. Did you see him any during the time he was there?

A. Yes.

Q. Did you stay out there with Mr. Berryman all the time?

A. I stayed out there pretty nearly all the time for a week anyway—something like that.

91 Q. State whether or not he made any complaint to you that he didn't get full possession of the property?

A. He didn't make any complaint, whatever.

Cross-examination by Mr. REID:

Q. What was that check and contract put in an envelope for when they made them out?

A. To keep them together I suppose.

Q. Where were you to keep them together?

A. In the Citizens National Bank I suppose.

Q. It was agreed when they made out the contract and check that they would put them in an envelope for the purpose of going to the bank?

A. Yes sir.

Q. Then the check was turned over to George Davisson for his use?

A. No, not right then they didn't.

Q. It was turned over to him to carry to the bank along with Berryman and the rest of them?

A. Yes sir.

REID: That is all. (Witness excused.)

Mr. DUNN: That is our case.

Mr. GIBBANY: Mrs. Owens closes also.

Case of Defendant, Citizens National Bank.

Mr. REID: The defendant, Citizens National bank, moves the Court to render a verdict in behalf of the defendant, Citizens National Bank, upon the evidence of the plaintiff, on the ground that the plaintiff has failed to establish by evidence the facts that were necessary to constitute a cause of action as against the defendant Citizens National Bank.

COURT: I will take the testimony for the defense: Motion denied without prejudice.

J. J. JAFFA, a witness produced and sworn on behalf of the defendant bank, deposed as follows:

Direct examination by Mr. REID:

Q. State your name?

A. J. J. Jaffa.

Q. What is your occupation?

92 A. I am Cashier of the Citizens National bank.

Q. How long have you been cashier of the Citizens National Bank?

A. Since August 1907.

Q. Acquainted with the parties of this suit?

A. Yes sir.

Q. Do you remember the occasion of them coming to the bank with Mr. Davisson, Mr. Solon M. Owens, Mr. Berryman and leaving papers with you.

A. Yes sir.

Q. At the time those papers were handed to you was there any statement made by any of them, in the presence of all, as to what the bank's duty concerning the same was to be?

A. Yes sir.

Q. Was that statement reduced to writing or not?

A. Yes sir.

Q. Have you statement with you?

A. Yes sir.

Q. I wish you would produce it please (Witness produced paper.)

Q. Who dictated that statement?

A. Mr. Berryman and Mr. Davisson handed me the papers and told me what was to be done; I think Mr. Berryman made part of

the statement; I think Mr. Davisson said the papers were to be held until September tenth.

Q. Who wrote that statement down?

A. I did.

Q. After writing it down I will ask you to state whether you read it to anyone?

A. After I made this memorandum I read it and asked the parties present if that was the agreement.

Q. Who was present?

A. Mr. Berryman, Mr. Davisson, Mrs. Owens and her son.

Mr. REID: We offer this statement in evidence, if the court please.

Mr. DUNN: We object to it; it appears to be a mere memo-
93 randa made by the witness, not signed by any of the parties, not such an instrument as would be binding on any of the parties to the suit, and the fact that it don't purport to cover the whole agreement made at the time, and from the further fact that this memoranda made by the witness appears to be no recital as to who the parties are to the agreement, or what final disposition was to be made of the funds in case the agreement as noted here, was not complied with by any of the parties.

Mr. GIBBANY: For the estate of Solon B. Owens, deceased, the defendant objects for the reason that it is a memorandum shown clearly to be within the statute of frauds in that it is not signed by anyone and especially by any one having authority in the estate, either as executor or otherwise, and it is an attempt to modify or vary a written agreement by an unsigned executed, undated memoranda.

COURT: One feature of the matter the court thinks should be inquired into further? He testified that he read it and asked the parties present if that was the agreement: There is no statement by him as to the action of the parties.

Mr. REID:

Q. I will ask you to state what was said in response to your question; that this was a stipulation as to the bank's duty with respect to these papers?

A. They answered that it was.

Q. Who answered that it was?

A. All three of them.

Q. At the time this was made, or any time thereafter was there ever any other agreement between these parties that the bank should have any other duty than that embraced in the memorandum made on this envelope?

A. No sir.

Q. I will ask you whether or not any deed or abstract was ever placed in escrow with these papers?

A. No sir.

Q. Or offered by any party to you?

94 A. No sir.

Q. Were you ever notified by any one that the attorneys

for the purchaser, Berryman had ever approved any abstract of title to this land?

A. No sir.

Q. I will ask you to state whether or not you were ever requested to forward that check for collection prior to the 10th of September, 1908?

A. After the papers were deposited with me and the memorandum made on the envelope Mr. Davisson came back and suggested that I forward the check for collection.

Q. What did you state to him?

A. I told him I would.

Q. Was Berryman close at hand at that time?

A. No.

Q. Where had he gone?

A. He and Mrs. Owens had gone out—they were in the lobby—the—had started out—they may have been out of the building—I wouldn't say positive.

Q. That suggestion of Mr. Davisson's wasn't made in the presence of Mr. Berryman?

A. No.

Q. Did you forward this check for collection?

A. I did.

Q. Was it ever paid?

A. Yes sir.

Q. Did you place the money to the credit of Mrs. Owens?

A. No.

Q. Or Mr. Davisson?

A. No.

Q. What did you do with it?

A. Placed it back in the envelope, after the check was paid put a cashier's check in for the amount.

Q. I notice on this envelope "Don't deliver enclosed papers to anybody. J. J. Jaffa." Did you make that memorandum?

A. Yes sir.

Q. At what time?

95 A. After suit had been brought I made the memoranda so the papers would not get out of the bank.

Mr. REID: We tender this statement on the envelope again in evidence.

Mr. DUNN: We will renew our objection.

COURT: The objection is overruled.

(Accepted in evidence and marked Def't Ex. 1.)

Mr. REID:

Q. Did you ever know of any of the side agreements you have heard testified to about here in court until today, about taking possession and extending the time or anything of that sort?

A. I heard they had extended the time sometime after the contract was left there, but that was after the money had been withdrawn by Mr. Berryman.

Q. That is the first you heard of it?
A. Yes.
Q. Did either one of these parties pay the bank any sum of money or anything of value for its services in this behalf?
A. No sir.
Q. How did this cashier's check come to be returned to Mr. Berryman?
A. He came in the bank and demanded the return of this check, stating that the conditions of the contract had not been complied with.
Q. What did he say, if anything, if refusal was made? To return the check?

Mr. DUNN: We object, your Honor, to what that conversation between third parties was—nothing Mr. Berryman would say would justify Mr. Jaffa in turning over this money—in fact, Mr. Jaffa was advised of the circumstances under which this contract was handed in there, showing that this money was to be treated by these parties as the purchase money for this land, and the mere fact that Mr. Berryman threatened to sue them if he didn't pay over the money would not be any defense.
The COURT: I will take the testimony.

96 WITNESS: Mr. Berryman said he would sue the bank for holding this money unlawfully.

Mr. REID:

Q. Did you say anything to him about having an order from Mrs. Owens to pay Mr. Davisson five thousand dollars?
A. Yes sir, I think I did.
Q. I will ask you whether he consented to the payment of that money or not?
A. He did not.
Q. I will ask you if he consented to your sending this check down for collection?
A. He didn't know anything about it.

Cross-examination by Mr. DUNN:

Q. What interest has the Citizens National Bank in this suit?
A. None whatever, except we were sued for nine thousand dollars.
Q. What protection have you got as to the payment in case you have to pay it?

Mr. REID: I object to the question unless it is limited to Mr. Berryman.
COURT: He may ask what security you have from Mr. Berryman.
WITNESS: None whatever.
Mr. DUNN: Have you any security from Mr. Huey, father-in-law of Mr. Berryman?
Mr. REID: Objected to as immaterial—It don't make any difference.
COURT: I don't think it does: I sustain the objection.

Mr. DUNN:

Q. Is it a fact that the bank will or will not lose anything in case judgment should be rendered against it in this case?

Mr. REID: Objected to as irrelevant, immaterial and improper.
COURT: It goes to the interest of the witness doesn't it. I think I will allow it on that theory. He may answer.

A. I don't know sir.
COURT: You may inquire as to any indemnity he has,
97 with that in view.

Mr. DUNN:

Q. Have you any indemnity of any sort in case you should be adjudged to pay any sum in this case?
A. Yes.
Q. In what amount?
A. We have—I can't recall the amount—something over ten thousand dollars.
Q. Something over ten thousand dollars?
A. I can't tell exactly.
Q. Is that accompanied by a deposit?
A. Yes sir.
Q. Who made the deposit?

Mr. LUND: If your Honor please we object to these questions as improper.
COURT: The court permits them as they are laid on the extent of the interest of the witness in the ultimate result of this case; as bearing on his testimony I think that is proper inquiry.

A. (Witness.) Mr. R. W. Huey.
Q. What relation is he to Mr. Berryman?
A. I understood he was his father-in-law.

Mr. DUNN:

Q. Mr. Jaffa, did the deposit ever leave the bank which was made there at the time this contract was deposited with you on the 22 day of August, 1908?

Mr. LUND: We object to the inquiry if your Honor please—I don't think the inquiry would be proper. I think the court has properly held that they can inquire whether the bank was indemnified but beyond that, I submit, if the court please, they have no right to go.
COURT: He may answer.

A. I think not; I think the money was placed to Mr. Berryman's credit.
Q. You heard Mr. Gibbany's testimony this morning did you?
A. Yes sir.
Q. Do you remember the date of the conversation he testifies to have had there in the bank about this matter?

98 A. No sir, I don't.

Q. Do you remember the circumstances of that conversation?

A. No.

Q. Do you remember calling Mr. Gibbany down there to talk about this matter?

A. No. I wasn't present at the time that conversation took place. Mr. Gibbany said he thought I was there, it was during the noon hour and I was at lunch.

Mr. GIBBANY: I suppose that is the conversation you have reference to.

Q. You were not there?

A. No sir I wasn't there.

Witness excused.

Mr. REID: We offer in evidence the lease — Solon B. Owens to Mr. R. J. Donahue:

Lease accepted in evidence and marked Defendant's exhibit No. 3.

(Mr. Dunn reads to the court the objections of plaintiff to the deposition of C. C. Berryman.)

COURT: Is that the case for the defense?

Mr. REID: I think we would like to appear on Tuesday to ask Mr. Poe a few questions, on what Mr. Gibbany testified.

COURT: What do you expect to prove by Mr. Poe?

Mr. REID: We don't like to take the witness stand but Mr. Gibbany takes the position that the bank did wrong in turning this money over.

COURT: Are you ready to proceed with any other matter except that.

Mr. DUNN: I can't very well stay here till Tuesday: Outside of that I don't know whether there would be any objection: I don't thing it would be hardly proper to my client to leave this case open to have testimony introduced in my absence.

COURT: Is there any further testimony at this time?

Mr. REID: Not for the defense.

Mr. DUNN: Perhaps I will have a little rebuttal testi-

99 mony.

(Court adjourned.)

JUNE 16, 1909—7:30 p. m.

Taken up by agreement.

Rebuttal.

J. D. BELL, called in rebuttal.

Mr. DUNN:

Q. I believe you testified that you were present at conversation there in your office when Mr. Huey was present?

A. Yes sir.

Q. I will ask you if at that time you heard any proposition from

Huey with regard to turning over any bonds to the defendant Mrs. Etta Owens on a trade for this property?

A. I heard it discussed.

Q. State to the court what was said with regard to that?

A. Mr. Huey and Mr. Gibbany were discussing the proposition and he said something to Mr. Gibbany, that may be Mrs. Owens, perhaps he could turn over some bonds from some trust company in Arkansas as a balance of payment on this land and not give any notes—he didn't want to give any notes—he didn't want to give any notes, and referred to Mr. Gibbany and asked him what he thought about it. Mr. Gibbany explained Mrs. Owens' situation at the time, and the debt she was owing on the land in Texas, and that her object in selling this place was to get money or notes that she could use on the payment of that debt on the Texas land; and Mr. Gibbany said he would take the matter up with the parties who held Mrs. Owens' notes, and if they were willing to take the bonds and release the Texas land from the mortgage they held, and I believe Mr. Gibbany said he could see no reason why they should not take the bonds if they would take them at the same price as made her: Mr. Huey said there was too much red tape about that, didn't want to fool with it, didn't — anything to do with that sort of a proposition any further if that was what they were going to do.

Q. Was anything said in that conversation in respect to Mr. Huey buying this property himself?

A. Mr. Huey was doing the talking for his son-in-law; he said he was assisting his son-in-law to use these bonds for him to pay out on this land.

Cross-examination:

Mr. REID:

Q. You didn't know that Mr. Huey wrote Mrs. Owens a letter and that he withdraw that proposition, instead of withdrawing it right there did you?

A. No.

Witness excused.

GEORGE A. DAVISSON, recalled in Rebuttal.

Mr. DUNN:

Q. Mr. Davisson, in the deposition offered by the Citizens National Bank, in the testimony given by Mr. Huey, he makes a statement that he made you a proposition to purchase the place—that is the real estate mentioned in the complaint, known as the Owens' ranch a few miles east of Roswell: Please state whether or not such a proposition was ever made to you by Mr. Huey?

A. Mr. Huey never made made me any proposition to buy the Owens ranch?

Q. Did he make any proposition with respect to some bonds?

A. He did.

Q. State what that was.

A. Told me he had one hundred thousand dollars of the Huey-Lock Land Co., bonds and that they would like to use these bonds in payment of the $58,000 in notes, that Mr. Berryman was getting.

Q. What time did he make that talk to you?

A. That was on the 9th I believe—9th of September 1908.

Q. He further states that he afterwards wrote you a letter withdrawing the proposition, on the 14th day of September?

101 A. He did.

Q. I will ask you to examine this letter (hands witness letter).

A. This is the letter that he wrote me.

Mr. DUNN: We offer in evidence the letter above referred to.
(Letter accepted in evidence and marked Plaintiff's Exhibit D.)
(Mr. Dunn reads letter to the Court.)

Q. Did you have any conversation with Mr. Huey at any time with respect to buying this property?

A. Did not.

Q. Did you have any conversation with him at any time about putting these bonds in on the land trade for him?

A. I did.

Q. What proposition did he make with respect to trading these bonds?

A. He was buying the Hagerman orchard—the first deal we were on—304 acres for $150,000 and he wanted to put in these bonds for $75,000, provided Mrs. Owens would release Berryman from the contract.

Q. Was that before or after he offered to put them in on the Owens trade?

A. That was before.

Q. Did he make any other statement about the bonds?

A. I told him that contract and sale was made to Mr. Berryman; that Mrs. Owens made all preparations to move down to her Texas ranch, and she wouldn't entertain a proposition. I didn't think to call that deal off—which was made—and I offered to submit his proposition to Mr. Hagerman, which I did, and Mr. Hagerman turned it down.

Q. Did he want to trade these bonds to anybody else while here?

A. He told me if I could find any deal that was good he
102 would put these bonds in on any land deal I might get him.

(Excused.)
No cross-examination.

Mrs. ETTA OWENS, called in Rebuttal:

Mr. DUNN:

Q. Mr. W. R. Huey, in his deposition given in this case, states that after receiving sufficient encouragement from the said Davisson, and attorney of Mrs. Owens, one Gibbany, and also from Mrs. Owens, and believing my proposition would be accepted, I moved into the house formerly occupied by Mrs. Owens, and I obtained possession

of the house, furniture, yard around the house, chicken lot, and the use of one cow to milk, and this is all. I will ask you to state to the court whether or not you ever delivered possession of that property to Mr. Huey?

A. I don't think so—I gave possession to Mr. Berryman.

Q. Did you have any trade with Mr. Huey?

A. No sir.

Q. Mr. Huey moved at the same time Mr. Berryman did, didn't he?

A. I think so.

COURT: Anything further gentlemen?

Mr. REID: Nothing with the exception of what we said in regard to Mr. Poe testifying?

COURT: I will hear Mr. Poe's testimony on that point.

JOHN W. POE, a witness called on behalf of the defendant bank testified as follows:

Examined in chief by Mr. LUND:

Q. Give your name, residence?

A. John W. Poe, Roswell, banking business.

Q. What is your relation to the Citizens National Bank?

A. President.

Q. Do you know the plaintiff, George A. Davisson?

A. Yes sir.

Q. Do you know the defendant, Etta Owens?

A. Yes slightly.

Q. Do you know C. C. Berryman?

103 A. Yes slightly.

Q. Do you recall and can you give the substance of a meeting in the back part of your banking house, sometime in September probably, last year, in which Mr. Gibbany for Mrs. Owens, joined Mr. Reid and myself and Mr. Huey was present?

A. Yes sir.

Q. What was the matter in consultation, if you recall it, at that time?

A. It was the matter of an escrow that had been placed with the Citizens National Bank, in which the sale of some farm lands was involved.

Q. Do you remember what was the contention on the part of these attorneys and the persons they represented at that time?

A. Yes I think I do.

Q. Why was Mr. Gibbany called in if you remember?

A. My recollection is that I called Mr. Gibbany in myself with a view of having him and the representatives of Mr. Huey and Mr. Berryman arrive at some agreement by which their differences might be harmonized without further controversy.

Q. What was that controversy to which you refer—just as briefly as you can state it?

A. It seemed to be over the purport or meaning of an agreement

or contract between Berryman and Davisson as the agent of Mrs. Owens.

Q. Anything further?

A. The contract that was there in the bank and the memorandum—pencil memorandum made on the envelope that contained the contract, was what we had and supposed we were to be governed by according to our understanding with him and with Berryman and Huey—that Berryman was entitled to withdraw the escrow, but the representatives on the other side claimed not, and contended different to that, as I remember. That afternoon Mr. Gibbany said to me that there had been a supplemental—a subsequent verbal agreement,—one that changed the one in the bank, and which the
104 bank didn't feel authorized to take into consideration; but he made some statement to me to the effect that there had been and that he was expected to proceed to get up the abstract and to make good title to the land—as well as I can remember the substance of the conversation.

Q. Did he state to you at that time what, if any, were his objections to the proposed withdrawal by Berryman of this escrow. Did Mr. Gibbany state to you at that time his objections?

A. He said what I have just stated here now—that the contract had been modified, that there had been a subsequent verbal understanding and that he was expected to comply with that verbal agreement—but we knew nothing otherwise about that supplemental agreement—had no notice or nothing otherwise than what he stated.

Mr. LUND: I think, if the court please, we were practically limited to that phase of the matter.

COURT: I think it was understood he was to be examined only on this point.

(Testimony closed.)

I, W. H. Ungles, the duly appointed and acting stenographer in and for the district Court of Chaves County, New Mexico, at and during the trial of the above entitled cause, do hereby certify that the foregoing 86 pages constitute a full, true and correct statement of the testimony, all ruling- of the court, objections made and exceptions taken, on the trial of said cause, and that the same were taken down by me as such stenographer during the progress of said trial, to the best of my ability.

Witness my hand this 22nd day of February, A. D. 1910.

(Signed) W. H. UNGLES.

The foregoing is approved as a correct report of proceedings had on trial of this cause, to which the Court adds the following to make the record complete:

1. Plaintiff's Exhibit "A", introduced in evidence as shown
105 on page 12 of the report; said exhibit being as follows:

PL'FF EX. A.

ROSWELL, N. M., *September* 21*st*, 1908.

Mrs. Etta Owens and G. A. Davisson, her Agent, Roswell.

FRIENDS: I have the honor to say, that after an examination of the rights and titles to those certain tracts of land described in your contract with me of date 21st day of August last and which you therein obligated yourself to sell and convey to me by a good and sufficient Warranty deed of title, and covering 360 acres, being parts of Sections 7 and 12 in Twp. 11, R. 24, as described by you, I have found the following situation:

1. That the present possession of the said tracts of land, save an inconsiderable part, about a part of the dwelling House etc., is held by the Tenant of the late Solon B. Owens, under contract with him: that he refuses to surrender the property to any one.

2. That upon examination as to the title to the said lands, you having failed and neglected to furnish me with an Abstract of the title, you Mrs. Owens, do not own the property contracted to me, or any part thereof: that you have no control or dominion over any part of it, either by possession or title, have no authority or power to sell or convey the same, as you contracted with me to do, and that you had none on the date of said contract August 21, or on the date fixed for completing the said sale and purchase Sept. 10th, 1908 and that to complete said sale on said date or any date up to the present according to the said Contract was and is wholly impossible.

3. There were many other misrepresentations made to me as to the said lands, proposed to be sold to me, such as the quantity of the water, of which there is not sufficient for the irrigation of the lands and crops as represented to me, the value of the Crop of Ap-
106 ples, was also greatly misrepresented by your agent Mr. Davisson, as well as other matters relating to the values of the property, but all of these are insignificant considered with the entire failure of the title.

4. I contracted with you for a present title—complete and full and without encumbrance or liens of any sort. I want possession and title now, without delay or not at all. I am wholly unwilling to be detained with a future hope or expectation of a title from the Heirs, or from the Courts; these propositions are wholly unsatisfactory and I cannot and will not accept any of them—they are not in our plans or our Contract.

I therefore respectfully demand of you the return of my deposit, now in Escrow in the Citizens National Bank of Roswell, to-wit: $10,000, without delay; this I trust you are willing to do. If this shall be paid to me at once, I will waive all losses and damages suffered; if not so paid to me, I shall be obliged to take instant measures for its recovery with full compensation for my losses etc.

Respectfully,

(Signed) C. C. BERRYMAN.

2. Plaintiff's Exhibit "B" introduced in evidence, as shown on page 12 of the report; said exhibit being as follows:

PL'FF'- EX. B.

1383.

FAY ETTA OWENS, ADOLPHE ANDREWS, and J. W. OWENS, Executors of the Last Will and Testament of Solon B. Owens, Deceased, Plaintiffs,

vs.

LIZZIE M. ANDREWS and ADOLPHE ANDREWS, Her Husband; NATTIE Maud Sansing and J. F. Sansing, Her Husband; Nellie Owens, Solon M. Owens, James H. Owens, Mertia Lelia Owens, Robert Faucher Owens, Annie B. Owens, Tommie Owens, and Fay Etta Owens, Defendants.

107 *Order of Sale of Real Estate.*

Now upon this 5th day of October 1908, this cause coming on to be heard before the Court upon the petition, of Fay Etta Owens, Adolph Andrews and J. W. Owens, executors of the last will and testament of the *last* Solon B. Owens deceased, for the sale of the real estate hereinafter described and the plaintiffs being present in person and by counsel and infants defendants to-wit: Solon M. Owens, James H. Owens, Mertia Lelia Owens, Robert Faucher Owens, Annie May Owens, and Tommie Owens appearing by their guardian ad litem, L. O. Fullen, Esq., and the other adult defendants to-wit: Lizzie M. Andrews and her husband, Nettie Maud Sansing and her husband having entered their appearance and filed and answer herein and Fay Etta Owens, widow of said deceased, Solon B. Owens, having answered herein and Nellie Owens appearing herein, and it appearing to the Court that service of said petition and summons herein was had in Chaves County New Mexico on 12th day of Sept. 1908 and that all infant defendants were served with process on that day and that all the parties at interest are properly before the court and that all matters are at issue and the court having heard the evidence of the parties and having considered the pleadings filed herein and the evidence of the parties doth find:

1. That Solon B. Owens died testate at Donley County, Texas on April 25th, 1907, leaving surviving him his widow, Fay Etta Owens and his two married daughters Lizzie M. Andrews, Nettie Maud Sansing, and three sons, Solon M. Owens, James H. Owens, and Robert Funcher Owens and four unmarried daughters to-wit: Nellie Owens Mertia Lelia Owens, Annie B. Owens and Tommie Owens and no other children.

2. That by the terms of the last will of Solon B. Owens the real estate hereinafter described was devised to his said wife and
108 children and that they are the owners thereof as tenants in common.

3. That certain legacies aggregating the sum of $26,000.00 were by said will directed to be paid by the executors thereof to his wife and children and that the sum of $10,860.00 is now due.

4. That the estate of said Solon B. Owens is indebted on the lands hereinafter described in Chaves County, New Mexico, in the sum of $12,000 which is now payable and that it is indebted on 26 sections of land in Gray and Donley Counties, Texas, in the sum of $57,-500.00 secured by a deed of trust on said Texas Lands, a part of which indebtedness in Texas lands is now past due and an installment thereof will become due Nov. 15th, 1908.

5. That the executors of said estate have no funds on hand and no personal property of said estate with which to pay the mortgage on the Chaves County lands or the deed of trust, lien on the lands in Texas and that it will be impossible for said estate to hold both tracts of land and it further appearing to the Court that it will be to the best interest of said estate to sell the lands in Chaves County in New Mexico hereinafter described for the purpose of paying the indebtedness thereon and liquidating the indebtedness on the lands in Gray and Donley Counties, Texas.

It is therefore by the Court ordered that the said executors shall sell the following described lands in Chaves County, New Mexico to-wit:

South half of the Northeast quarter and North half of the Southeast quarter of Section twelve in Township Eleven South, of Range Twenty-four East of N. M. P. M.; Also the lots numbered three and four and the South half of the Northwest quarter and the Northeast quarter of the Southwest quarter section seven in Township Eleven South, Range twenty-five East of N. M. P. M.; Also an undivided one-third interest in and to the Texas Irrigation Ditch, which takes water from South Spring River, at private sale within one year from this date the same having been inventoried and ap-
109 praised by three disinterested householders of said County of Chaves and it appearing to the Court that said appraisement and inventory has been heretofore filed in this cause, and that the same be sold for not less than 90 per cent. of its appraised valuation.

It is further ordered by the Court that the executors of said estate shall not become purchasers of said real estate at such sale, either directly or indirectly and that before deed therefor shall be executed or delivered or any disbursement made of any part of the purchase money that such executors shall make due and proper report of their proceedings under this order and the approval of such report and sale shall be had before the execution and delivery of the deed for said property or any part thereof or the expenditure of any funds derived therefrom and that a report of such sale shall be verified by an affidavit of the executors showing that neither of them was a purchaser thereat and had no personal interest in such sale except as said executor.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

I, the undersigned, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, do hereby certify that the above and foregoing is a true and complete copy of an original "Order of Sale of Real Estate" in a cause lately pending in the aforesaid Court, wherein Fay Etta Owens, et al., Executors, were plaintiffs, and Lizzie M. Andrews, et al., were defendants, as shown from the files and record of my said office, towit: At pages 104 and 105 in Book G of Court Records of Chaves County, New Mexico.

In witness whereof, I have hereunto set my hand and
110 affixed the seal of said Court, at my office in Roswell, this 12th day of June, A. D. 1909.

[SEAL.] (Signed) S. I. ROBERTS, *Clerk.*

Endorsement: No. 1383. In the District Court, Chaves County, New Mexico. Fay Etta Owens, et al, Executors, vs. Lizzie M. Andrews, et al. Certified copy of order of sale of real estate.

3. Exhibit 1, introduced in Evidence by defendant, Citizens National Bank, as shown on page 75 of the report; said exhibit being as follows:

DEF'TS EX. 1.

Escro- Berryman & Owens.

Check enclosed to be held in Escro- until Sept. 10th when final settlement is to be made. Deed and abstract to be placed in Escro- with this. Abstract to be forwarded to Citizens Bank & Trust Co., Arkadelphia, Ark., for examination. No money to — paid over until abstract is approved by purchaser's att'y.

Don't deliver enclosed papers to anybody.

J. J. JAFFA, *Cash.*

Berryman notice taken out by Mr. Lund 11-24-08.

4. Exhibit 3, introduced in evidence by defendant, Citizens National Bank, as shown on page 79 of the report; said exhibit being as follows:

DEF'T'S EX. 3.

ROSWELL, NEW MEXICO, *January 7th*, 1907.

This agreement made the day and date above written by and between S. B. Owens party of the first part and R. J. Donahoo party of the second part, both of Roswell, N. M., Witnesseth:—

111 That the said first party has this day leased to the second part- his farm of 240 acres near Roswell, N. M., and known

as the Medley farm in consideration of the within agreements and undertakings.

Reserving however to the said first party the main dwelling house and barns and grounds adjacent thereto and being the lawn gardens and orchards and small fruit near and about said house about five or six acres in all.

The second party is to sow all the land to alfalfa as fast as practical, and to *disc* the present meadows on the farm and to resow any barren spots in the meadows, the seeds for such sowing to be furnished by the first party; The second party is to keep clean and in a good order all the ditches on the farm and to construct any new ditches that may be needed at his expense, and to keep down all weeds on the farm and not permit weeds to seed thereon, and to look after the fencing and keep and maintain the same in good repair during his tenancy, and to cut and harvest all the hay on the premises as the same may be ready from time to time for harvest, stacking any damaged hay, and baling the marketable hay, each party to have an equal share of the hay grown on the premises, the half of the first party to be placed in the hay barn on the premises, and to be marketed for the first party as he may direct, the second party shall be paid the sum of five cents per hundred pounds for delivering the hay of the first party on the cars at Roswell as directed.

The second party to properly irrigate and cultivate the said land and all of it, and to care for the hay grown on the premises and pay as rent for said premises the one half of all the hay and the one third of all other crops grown on said premises to the first party, including therein two thirds of the proceeds of all winter pasture on the said premises, after the harvest.

The second party to have firewood and for his house hold use out of any dead wood on the premises without charge, but if
112 green wood be used he is to pay the price of such wood, and is to haul out all manure from the premises and place the same on the fields and keep the lots clean of manure and litter.

It is further agreed and understood that no notice to terminate this tenancy shall be required and that the service of such notice is specially waived by the execution of this agreement, other than the verbal or written notice of the first party to the second party that he desires to terminate the said lease, but after the beginning of harvest the said lease shall not be terminated until the close of the harvest. It is understood that the said first party desires to sell the said premises and in the event of such sale the said premises are to be delivered up to him and the possession thereof upon such sale and notice as above required to the second party, and in the event of the failure of the second party to keep the agreements herein set out to be kept by him the said first party has the right to re-enter and take such the possession of said premise-.

The second party is to furnish a team to break the gardens and plow such of the grounds around the house as may be desired without charge, plowing to be done by the tenant of the gardens.

The second party is purchasing of the first party certain tools and work animals to be used on the premises and it is understood that the said stock and tools shall stand for the unpaid purchase money to be due the first party and that such sums due the first party shall be paid out of the first and second cuttings of alfalfa in this season, the said first party reserving a lien for said unpaid purchase money on the stock and tools and also upon the on'-half of the said first and second cuttings of alfalfa.

Witness our hands and seals.

(Signed) S. B. OWNENS.
RUFUS J. DUNNAHOO.

113 Endorsed: Lease. S. B. Owens to R. J. Dunnahoo.

5. Plaintiff's exhibit "D", introduced in evidence, as shown on page 82 of the report; said exhibit being as follows:

PL'FF'- EX. D.

ROSWELL, N. M., 9, 14, '08.

G. A. Davisson, Roswell, N. M.

MY DEAR MR. DAVISSON: Since I have heard nothing from you or Mrs. Owens notwithstanding my proposition was made on the 9th inst. I beg to withdraw same and now call all deals off so far as the bonds are concerned, and you can now proceed along original lines with Mr. Berryman, trusting you will at once notify her attorney Mr. Gibbany, I beg to remain,

Respectfully,

(Signed) R. W. HUIE.

6. Portions of the deposition of C. C. Berryman, offered in evidence by defendant Citizens National Bank, as follows:

Deposition of C. C. Berryman Offered by Defendant Citizens National Bank.

Interrogatory No. 1. State your name, age, residence and occupation?

Answer. C. C. Berryman, age thirty-five, am a resident of Arkadelphia, Clark County, Arkansas. Druggist.

Int. No. 2. Were you at any time in Roswell, Chaves County, New Mexico? If so when—from what date to what date?

Ans. Yes about August 10th to Sept. 29th, 1908.

Int. 3. Do you know the parties to this action, or any of them—the Plaintiff? the defendant Etta Owens? or the defendant Citizens National Bank or its officers? If so, state where, and the time you have known them or either of them?

Ans. to Int. 3. Yes. I know the plaintiff, G. A. Davisson, the defendant Etta Owens, and the Citizens' National Bank of Roswell, and its cashier, Mr. Jaffa and Col. Poe, the President. I met them

all for the first time at Roswell, New Mexico between the dates
114 mentioned in my answer to Interrogatory No. 2. I never knew any of them before that time.

Int. 4. Did you have any business negotiations dealings or transactions with either of the defendant-, if so, state fully their nature and character, with whom such were had or conducted, and what results or fruits *of* any came of any of them?

* * * * * * *

Plaintiff and defendant Etta Owens joined by her co-executors object to the 4th interrogatory because same calls upon the witness to state the nature and character of negotiations which were afterward embodied in writing and is an attempt to vary the terms of the written contract by parol testimony.

The Court sustains said objection except as it may refer to the transactions of the parties at the time the written contract was deposited with the defendant Bank. And on objection by same parties all of the answer to said Fourth Interrogatory is excluded except the following:

Ans. to 4th Inter-og.: * * * I signed the contract which Mr. Davisson had prepared and I at that time wrote out a check for $9,173.32, and I kept the check in my hands, and Mr. Davisson took the contract; and Mr. Davisson and Mrs. Owens and I went together to the Citizens National Bank of Roswell, and we all went together into the Cashier's private office. This was before the bank was closed for the day. Mr. Davisson had put the contract in an envelope and Mr. Davisson handed Mr. Jaffa, the cashier, the envelope, and about the same time, I handed Mr. Jaffa the check, and Mr. Jaffa asked what we wanted done with them. And in answer to this I dictated to him the following words which he reduced to writing on the envelope in the presence of Mr. Davisson, Mrs. Owens and myself, to-wit: "Check enclosed to be held in escro- until Sept. 10th, when final settlement is to be made. Deed and abstract
to be placed in escro- with this. Abstract to be forwarded to
115 Citizens' Bank & Trust Company, Arkadelphia, Arkansas for examination. No money paid over until abstract is approved by purchaser's attorney. Don't deliver papers to anyone." Mr. Jaffa read this aloud and asked if we all assented to it, which we all three did.

The contract which I signed, and which was enclosed in the envelope hand- to Mr. Jaffa, and which was not to be delivered to anybody until the agreement of escro- had been complied with, is the same in words and figures as that attached to the complaint in this action and marked "Exhibit A."

After Mr. Jaffa had read the stipulations of escro- aloud to all of us, to which we all assented, we left the bank.

On about Sept. 22, 1908, I demanded from the Bank a return of the check or its equivalent and they returned same to me after due consideration.

Int. 5. If your previous answer discloses that a contract, agreement or stipulation—one or more, were entered into by you or

between you and any of the parties to this Action, then state if these or any of them were submitted to writing? and if so, can you identify them or any of them in Plaintiff's complaint, Defendants' answer or any of the pleadings in this Action? and if you can so identify them, do so? Answer fully.

Ans. to Int. 5. Yes; the contract which I have just mentioned that was put in an envelope and handed to Mr. Jaffa was reduced to writing, and I identified it as "Exhibit A" in plaintiff's complaint. The other agreement was the agreement of escro- which was also reduced to writing by Mr. Jaffa on the back of the envelope, and the exact words of which I have set out in the answer to Interrogatory No. 4, and which is set out on Page 2 in the answer of the Citizens National Bank under the head of 2nd defense, but first defense by way of new matter in answer to cross-complaint of Fay Etta Owens by way of new matter and headed escro-. Berryman and Owens.

116 Int. 6. If you have identified the Agreement or Contract, made by plaintiff a part of his complaint, then state with whom you negotiated such contract or agreement, and where and when? and for whom such person or persons stated or represented he or they were acting, if any such statement or representation was made as to any person or persons? Answer fully.

Ans. to Int. 6. My answers to Interrogatories No. 4 and No. 5 fully answer Interrogatory No. 6, except I will state that Mr. Davisson acted in all the negotiations as agent of Mrs. Owens, and Mr. Jaffa as the cashier of the Citizens' National Bank.

Objections by plaintiff and the defendant Etta Owens joined by her co-executors, to the 7th, 8th, 9th and 10th Interrogatories are sustained.

Int. 11. Were you at any time furnished with an Abstract of the Title to the lands described in the contract made a part of complaint. If so, to what date was such Abstract bro't? and in whom did it show the fee or title? Have you that abstract or can you produce it? If so, attach it to your answer. Answer fully.

Ans. to Int. 11. No, I was never furnished an abstract, but Mr. Davisson did borrow a partial abstract from an insurance company that had made a loan on the place to Solon B. Owens some years before. The *This* insurance company specified that this abstract should be returned to them in a very limited time. This partial abstract was sent to my attorneys at Arkadelphia, Arkansas, but it only showed title down to the date when the money was borrowed from the insurance company by Solon B. Owens. I do not remember the exact year this was, but it was several years ago. In this partial abstract my attorney advised me there was not title to the Texas Ditch to the last grantee therein, and the title to the land was not in Mrs. Owens' name, but in the name of Solon B. Owens. I cannot produce same, as it was returned to the agent of the Insurance company, at the request of Mr. Davisson. This is

117 the only abstract that was ever offered in the matter, and Davisson seemed so anxious to get this back and return to the

insurance company, that I hardly had time to examine it as it should have been examined.

Int. 12. If in your previous answers, you state (1) that the abstract given or submitted to you, is not now in your possession, control or power, and you further state (2) that by it the title to the lands in question was shown to be in one Solon B. Owens or to this effect, then state, if any statements or representations were made to you by plaintiff or defendant Etta Owens, as to the then title to or ownership of the said lands and property, and if so, what statements or representations were made to you, and by whom?

Ans. to Int. 12. When the abstract was returned to me by the Citizens' Bank & Trust Co., with the advice of my attorney, as I have above indicated, I informed Mr. Davisson of what my attorney had said, and he informed Mrs. Owens, and she came to town looking for the will, but said she could not find it, claiming that it was in some deposit box in one of the banks, and that she had asked the bank officials where it was and she said they said that they had not located it yet. A few days after this Mr. Davisson came to me and said that they had found the will, and that Mr. Gibbany, Mrs. Owens' attorney said that it would take a court order, which would only take a day or two to get, and Davisson talked at that time about the Probate Court. All this happened along about the 10th of September, 1908.

The remainder of the answer to this interrogatory was excluded on objection of the plaintiff and of the defendant Etta Owens, joined by her co-executors.

On objection by the same parties Interrogatory 13 and the answer thereto were excluded.

Int. 14. What instrument, purporting to sell, Grant and Convey to you the lands, described in the Contract made part of Complaint, if any, was at any time shown or tendered to you? or to any one for you? and if not to you or for you, were you in any manner
118 or at any time given notice or information that such instrument was prepared and ready for delivery to you?

Ans. to Int. 14. No instrument of any kind purporting to sell, grant and convey to me the land described in the contract made part of the complaint was at any time ever shown or tendered to me, or to anyone for me, with my knowledge, and I have never in any manner or at any time been given any notice or any information that such instrument was prepared and ready for delivery to me.

Int. 15. Did you at any time make demand upon defendant Etta Owens or upon the Plaintiff, in writing, with reference to the said lands and your contract concerning them? if so, produce the same or a duplicate of it, and state when, where and to whom, if any one, you delivered such demand? and state also if the paper you identify and attach to your answer, is a full and true copy or duplicate of the ones you gave to defendant Etta Owens or plaintiff or both of them?

Ans. to Int. 15. Yes; and I hold in my hand the original demand and notice, a true copy of which I duly served upon the following

persons in person, on the 22nd day of September, 1908, to-wit: Mrs. Etta Owens, defendant, G. A. Davisson, Plaintiff, and J. J. Jaffa, Cashier of the Citizens' National Bank of Roswell. On the same day a memorandum was made on the back of this original notice which I now hold, and which memorandum I duly signed, likewise also having signed the notices. I attach this notice to my deposition and marked same "Exhibit A." This notice or demand which I attach is the original notice from which the true copies, or duplicate, were made and served, as above set forth.

Int. 16. If in your answer to Int. 15 you describe your demand upon plaintiff or defendant Owens or either of them, and attach duplicate thereof, then state what action, if any was taken by defendant Owens or any one in the matter? Was any offer
119 or tender of possession of the premises and lands made to you? or any offer or tender of Deed or Instrument conveying title to said lands made to you? If so what was so offered or tendered to you? and when?

Ans. to Int. 16. After I served the notice on these parties, as I have indicated, no action was taken by the Defendant, Etta Owens, or anyone at all, and no offer or tender of possession of the premises and lands was made to me, and no offer or tender of any deed or instrument conveying titles to said lands was ever made to me.

Int. 17. What dealings or transactions, if any did you have with the defendant—Citizens National Bank, in any way relating to the matter at issue herein? and were the plaintiff and defendant Etta Owens present and a party to any such transactions? and if so, state what was done or agreed between you, and the said parties—the plaintiff and defendant Etta Owens, to which the defendant Citizens Nat'l Bank was a party in any way? and if same or any part thereof was committed to writing? and where that writing is, if you know?

Ans. to Int. 17. I have answered this fully in my answer to Interrogatory No. 4, but I will state further, in order to be clearly understood that the contract which I signed, together with my check, was placed in escro-. * * *

On objection of plaintiff and of the defendant Etta Owens, joined by her co-executors, the remainder of the answer to this interrogatory was excluded.

Int. No. 18. State whether or not you at any time paid defendant, Etta Owens, or the plaintiff in this case, or any one for the defendant Etta Owens any sum of money as part payment for the property in question in this case.

Ans. to Int. 18. No sir; the trade did not get that far along; the original conditions upon which the operation of the contract was to take effect, had not been complied with.

120 Plaintiff and the defendant Etta Owens, joined by her co-executors objected to the 18th interrogatory and the answer thereto on the ground that same is an attempt to vary the terms of the written contract by parol testimony; which objection was by

the Court overruled and said Interrogatory and answer permitted to stand, to which ruling the objecting parties duly excepted.

Inter. No. 19. The complaint alleges that certain monies or bills of exchange were paid by you to the Citizens National Bank for the use and benefit of defendant, Etta Owens, as part payment for the land in question, please state for what purpose said money was deposited or placed in said Citizens National Bank.

Plaintiff and the defendant, Etta Owens, joined by her co-executors, object to the 19th interrogatory on the ground that same calls for the opinion of the witness as to the purpose of the deposition, and for no material fact. And the answer to the 19th interrogatory was objected to by the same parties on the grounds, (*a*) that same gives the opinion of the witness as to the effect of assumed facts and not the facts themselves; (*b*) that same is not responsive; (*c*) that the effect of the proposed evidence is to vary a written contract by parol. These objections were by the Court overruled and the interrogatory and the answer thereto admitted in evidence; to which ruling the objecting parties duly excepted.

Ans. to Int. 19. I did not deposit any money in the Citizens National Bank of Roswell, or any bills of exchange for the use or benefit of anybody, that had anything that had to do with the subject matter of this controversy, but I did make out my personal check as I have before stated, which was drawn on the Citizens' Bank & Trust Co., of Arkadelphia, Arkansas, and had this check put in the envelope above referred to, to be turned over, only when escro- agreement had been complied with. I was not to have the
contract in my possession, in which is a clause that would
121 operate as to have the effect of a receipt from Mrs. Owens for part of the purchase price, and Mrs. Owens and her agent were not to have the check or contract in their possession until the conditions of the escro agreement had been fully complied with. I want to explain in this connection that while I was at the office of Mr. Davisson, the day the original contract was signed by me, that he suggested that we all three have a copy of the original agreement or contract, so that we would know what the contents were, but that there was to be only one original contract, and this was the one that we handed to Mr. Jaffa and which was really never delivered to me or to Mr. Davisson or Mrs. Owens, and which has not been delivered so far as I know up to this good hour.

Int. No. 20. If in your answer to the preceding interrogatory you have stated that the purposes for which the said money was placed by you with the Citizens National Bank were fully set forth in the written memorandum made by the Cashier of the said bank at the time said money was deposited and in the presence of the defendant Etta Owens, and yourself, then please attach said memorandum to your deposition if you have said memorandum please state whether or not said memorandum is correctly set out in your first defense by way of new matter in your answer to the cross complaint herein.

Ans. to Int. No. 20. I have not got the original memo. made by

Mr. Jaffa, and am pretty sure that Mr. Jaffa has it. I know positively that the memorandum is correctly stated in first defense by Citizens National Bank by way of New matter.

Int. No. 21. Please state whether or not final settlement was made for said land on or before September 10, 1908.

Ans. to Int. 21. No sir; nothing was ever done towards it.

Int. No. 22. Please state whether a deed and abstract, or either of them were placed in e-crow with said memorandum at
122 the time said memorandum was made.

Ans. to Int. 22. No sir; no deed and no abstract or either was placed in escrow with said memorandum at the time same was made, and none have since been placed so far as I know.

Int. No. 23. Please state whether or not a complete abstract of title to said land was ever forwarded to the Citizens Bank & Trust Company of Arkadelphia, Arkansas for examination?

Ans. to Int. 23. No sir; No complete abstract was ever furnished and no complete abstract was ever forwarded to the Citizens Bank & Trust Co., at Arkadelphia, Ark., for its examination.

Int. No. 24. Please state whether or not an abstract of title for the land in question was ever approved by your attorneys at any time?

Ans. to Int. 24. No sir; the partial abstract was even not approved.

Int. No. 25. Please state whether you, at any time, verbally agreed to extend the time for the carrying out of the contract of sale as alleged in the cross complaint herein.

Ans. to Int. 25. No sir; I never agreed verbally or in any other way to extend the time for the carrying out of the contract of sale.

Int. No. 26. If it was suggested by any of the parties that a procedure be commenced in the District Court to obtain an order of said court permitting the sale of said property, then please state at whose suggestion or request was said procedure commenced.

Ans. to Int. 26. I do not know whether any procedure has ever been commenced or not, but if it has, it certainly was not at any suggestion of mine, and whoever started any such proceedings did so of their own volition, and suggestion so far as I know.

Int. No. 27. Please state if you were ever in possession of the land involved in this action or any part thereof.

Ans. to Int. 27. No sir, I was never in possession of the
123 land involved in this action. I did move out to the house on the land with R. W. Huie, believing at that time that his proposition to purchase the place would be accepted, Mr. Huie found that a renter had control of the land and we immediately moved off.

Int. No. 28. Please state if the defendant Etta Owens, or her agent ever attempted to place you in possession of all of said described land?

Ans. to Int. 28. No sir.

Int. No. 29. Please state how you are related if at all to R. W. Huie.

Ans. to Int. 29. I am his son-in-law.

Int. No. 30. Please state why you did not take possession of all

of said described land if you have answered in Interrogatory No. 29 that you did not obtain possession of all of said land.

Ans. to Int. 30. At this time I considered my deal practically off, as they had failed to comply with their part of the agreement, and when I went on the place I did so thinking that they were going to accept R. W. Huie's proposition. And I was with Mr. Huie when we found out that one Mr. Donohoo had a lease on the place which did not expire until Dec. 31st, 1908 or Jan. 1st, 1909, and was in possession at the time under said lease. Mr. Donahoo moved some of his folks to town, about this time and said he wanted to have his childern close to school, but he stayed on the place, and his hired men, and retained possession thereof, and said that it would take $900.00 to get him out of possession, and he went to irrigating the next crop.

Int. No. 31. If you have answered that you did not obtain possession of all of said described land for the reason that one Donahue was in possession of a portion thereof, then please state of what portion said Donahue was in possession.

Ans. to Int. 31. He was in possession of the whole place, except the main residence, and its yard, and he even had his cows and chickens in the cow lot and chicken lot.

Int. No. 32. Please state whether or not you had any con-
124 versation with said Donahue concerning you obtaining possession to all of said described land. Please answer fully.

Ans. to Int. 32. Yes sir; I asked Mr. Donahue for Mr. Huie what he would cut the alfalfa crop for, he kinder hesitated and stammered and said "Why—er,— I am to get half of it," and I asked him what he meant, he said that one half of the alfalfa and pasturage was his until the end of the year, that he had a contract with Solon B. Owens to that effect. I demanded to see the contract and he sent a man to Roswell to get the contract, which he brought and showed to me and Mr. Huie, and said that he would not surrender the possession for less than $900.00.

Int. No. 33. If you have stated in substance in answer to the preceding interrogatory that said Donahue demanded the sum of $900 of you as a consideration for his relinquishing a portion of said land, please state whether or not you paid this money or a portion thereof to said Donahue, or any one for him.

Ans. to Int. 33. No sir, I did not.

Int. No. 34. Please state what you did as a result of the conversation you had with said Donahue concerning possession of said land.

Ans. to Int. 34. We immediately moved off of the place.

Int. No. 35. Please state whether or not any paper purporting to be an abstract of title of the water rights appurtenant to said land was ever offered to you or to your attorney or anyone for you.

Ans. to Int. 35. The one partial abstract borrowed from the Union Central Life Insurance Co., to the lands in question is the only abstract of any kind or character that was ever furnished me or anybody for me; * * *

On objection of plaintiff and of defendant Etta Owens, joined by her co-executors, the remaining portion of the answer to this interrogatory was excluded.

Objections by the plaintiff and of defendant Etta Owens,
125 joined by her co-executors, to the 36th, 37th and 38th, interrogatories, were sustained.

Cross-interrogatories:

1. Is it not a fact that Mrs. Owens furnished you with an abstract to the land in question long before the 10th day of Sept., 1908, and did you not send such abstract to the Citizens Bank & Trust Company of Arkadelphia, Arkansas, for examination by your attorney, and did you not receive such abstract back in Roswell about the 10th day of Sept., 1908, with an opinion from your attorney that an order of court should be had authorizing the executors of Solon B. Owens, deceased, to make you a deed, and did you not on or about said Sept. 10, advise the plaintiff and Mrs. Owens or their attorney that an order of Court was demanded by you in order to perfect the title and after such demand on your part was it not agreed that you should go into immediate possession of the property and did you not in fact do so?

Plaintiff and the defendant Etta Owens, joined by her co-executors, object to the answer to Cross-interrogatory One and move to exclude the same on the grounds (*a*) that same is not responsive; (*b*) that same states opinions and conclusions of the witness, and not the facts on which such opinions are based. Which objection was by the Court overruled and the answer to such cross-interrogatory admitted, to which ruling of the Court the objecting parties duly excepted.

Ans. to C. Int. 1. Mrs. Owens furnished me the partial abstract which was by no means down to date, which I have mentioned several times in my previous answers. I did send this partial abstract to the Citizens Bank & Trust Co., at Arkadelphia, Ark., to be examined by my attorney, and it was examined by him and he wrote me that he could not tell anything about the title to the place being in Mrs. Owens as the abstract was incomplete, and that so far as the abstract went that the title to the Texas Ditch was

defective, in fact he advised that he would not assume the
126 responsibility of even suggesting what course for me to pursue,

as he could tell nothing at all without what purported to be an abstract up to date at least. He did not say anything about having the executors of Solon B. Owens, deceased, to make me a deed or having the court get them to, as he knew nothing about the death of Solon B. Owens, and knew nothing about who he was, or that he made any will, as he only knew what the abst*h*act showed, and that abstract could again easily be obtained by Mr. Davisson borrowing it from the agent of the Union Central Life Ins. Co., as he did that time, I referred to. So I was absolutely in the dark as to where the true title was, and in fact it was about the 10th of Sept. before I ever knew about the will, and not being an attorney,

I did not know even if the will did convey Mrs. Owens a child's part, what would be necessary for her to do to make a good title to the place to me, and so of course, I did not suggest what should be done, as it was not up to me to do suggesting about something that I didn't know a thing in the world about. So I did not advise the plaintifi and Mrs. Owens, or either one of them, or their attorney that an order of the court was demanded by me in order to perfect the title. * * *

I am under the impression that Mr. Gibbany is the one that said something about getting an order of the court, and that he said it in talking about the proposition of R. W. Huie to purchase the place, and to R. W. Huie in my presence. There was not a word said to me, and there was positively no agreement at this time or after this time that I should go into possession of the place, and I simply went with Mr. Huie to the place, he and I both honestly believing that they would accept his proposition to purchase the place with bonds, and it was under his proposition that we moved out there.

Plaintiff and the defendant Etta Owens, joined in by her co-executors, objected to all that portion of the answer to cross-interrogatory No. 2 following the words "No sir," on the grounds
127 that same was not responsive, which objection was by the Court overruled, the whole of said answer admitted; to which the objecting parties duly excepted.

2. Did you not give to G. A. Davisson, as agent for Mrs Owens, your check for $9,173.32 in part payment of the land in question in room 4 Texas Block in the City of Roswell, New Mexico, in the presence of Etta Owens, Solon B. Owens, Miss Ada Anderson and G. A Davisson, and immediately thereafter did not G. A. Davisson, yourself, Etta Owens and Solon B. Owens go — the Citizens National Bank of Roswell, and present the check together with the contract attached to the complaint to J. J. Jaffa, Cashier of said Bank, and did not the plaintiff request said Jaffa, Cashier of said Ba- *the plaintiff request said Jaffa* to collect the proceeds of the check and hold the same in the Bank together with the contract until Berryman received deed and abstract?

Ans. to C. Int. 2. No, sir. The truth is I wrote a check on August 21st, 1908 to be placed in the bank but not to be delivered until final settlement was made, which was to be Sept. 10th, 1908, as per instructions given to Cashier Jaffa. I wrote this check out while I was in Room 4, Texas Block, in the presence of Etta Owens, Solon B. Owens, her son, Miss Ada Anderson, (Davisson's stenographer) and Mr. Davisson, and I guess there were some others in there but I do not remember their names. This was in Mr. Davisson's office, and Solon B. Owens, the boy, and Miss Anderson, as well as all the rest of them except Mrs. Owens and Mr. Davisson, took no part in what was going on at all and did not read over the contract and did not know anything about what we were doing. As I have stated before Mr. Davisson, Mrs. Owens and myself immediately after this went to the Citizen's National Bank of Roswell,

and if Solon B. Owens went along I did not notice him, and he stayed outside the bank around the door if he went to the bank, because I know positively that he did not go to the cashier's
128 desk with us, and if he was around there at all I did not see him. I will again state what is the truth and what I stated before about what happened in the cashier's office upon that day. I handed the check to Mr. Jaffa, and about the same time, Mr. Davisson handed him the contract which was in an envelope, and the envelope was not sealed and Mr. Jaffa asked us what we wanted done, and then it was that I dictated to him the escro- agreement, which I have set out at length already in my deposition. He wrote it down on the back of the envelope which contained the contract, and signed this. He then read aloud to all of us the escro- agreement, and asked Mr. Davisson and Mrs. Owens if that was the agreement and if they assented to it, and they said 'yes'. I know positively that the plaintiff did not at that time in my presence or at any other time so far as I know request Mr. Jaffa to collect the proceeds of the check.

3. If you have stated that you placed a check with said Citizens National Bank or that you gave a check to plaintiff to be placed there, please attach such check to your deposition and have the officer identify the same as an exhibit.

Ans. to C. Int. 3. I have asked for the check and tried to locate it, but have been unable to find it, and so cannot attach it to my deposition.

4. Did you not move out on the Owens farm on the 10th day of Sept. 1908, and did not Donahue, the tenant in possession of such farm, move to Roswell on the same day and in the presence of G. A. Davisson tell you that you could have possession of said property. Were you not living on the Owens farm with your family when Mr. Huie came to Roswell?

Ans. to C. Int. 4. As I have stated before, I went out on the Owens farm with Mr. R. W. Huie on the 10th of September, 1908, at the time honestly believing that Mr. Huie's proposition would be accepted. As I have said before, Mr. Donahue, the tenant in
129 possession of the farm, about this time or a day or two before, moved his family and some of his household goods to Roswell, and told me that he moved them there so that his children might go to school at a higher school than they had been attending. But he did not move to Roswell himself, but remained on the farm, and kept his horses, cattle, chickens, hogs, farming implements, hired hands, with him, and continued working on the place. Mr. Donahue never did tell me either in the presence of G. A. Davisson, or at all, that either Mr. Huie or I could have possession of the property, but since I remember it he did say that no man should have possession without giving him satisfaction, and that that satisfaction would have to be $900.00 for his lease. I was not living on the Owens farm when Mr. Huie came to Roswell, but was boarding at the Grand Central Hotel, as you can find out from their books.

(Signed) C. C. BERRYMAN.

Certificate of Notary Public taking deposition follows.

"EXHIBIT A."

ROSWELL, N. M., *September* 21*st*, 1908.

Mrs. Etta Owens and G. A. Davisson, her agent, Roswell.

FRIENDS: I have the honor to say, that after an examination of the rights and titles to those certain tracts of land described in your contract with me of date 21st day of August last and which you therein obligated yourself to sell and convey to me by a good *a* sufficient Warranty deed of title, and covering 360 acres, being parts of Sections 7 and 12 in Twp. 11, R. 24, as described by you, I have found the following situation:

1. That the present possession of the said tracts of land, save an inconsiderable part, about a part of the dwelling House etc., is held by the Tenant of the late Solon B. Owens, under contract with him; that he refused to surrender the property to any one.

2. That upon examination as to the title to the said lands,
130 you having failed and neglected to furnish me with an Abstract of the title, you, Mrs. Owens, do not own the property contracted to me, or any part thereof; that you have no control or dominion over any part of it, either by possession or title, have no authority or power to sell or convey the same, as you contracted with me to do, and that you had none on the date of said contract Augt. 21, or on the date fixed for completing the said sale and purchase, Sept. 10th, 1908, and to complete said sale on said date or any date up to the present according to the said Contract was and is *was and is* wholly impossible.

3. There were many other misrepresentations made to me as to the said lands, proposed to be sold to me, such as the quantity of the water, of which there is not sufficient for the irrigation of the lands and crops as represented to me; the value of the crop of apples was also greatly misrepresented by your agent Mr. Davisson, as well — other matters relating to the values of the property, but all of these are insignificant considered with the entire failure of the title.

4. I contracted with you for a present title—complete and full and without encumbrances or liens of any sort; I want possession and title now, without delay or not at all. I am wholly unwilling to be detained with a future hope or expectation of a title from the heirs, or from the Courts; these propositions are wholly unsatisfactory and I cannot and will not accept any of them—they are not in our plans or our contract. I therefore respectfully demand of you the return of my deposit now in escrow in the Citizens National Bank of Roswell, to-wit: $10,000 without delay; this I trust you are willing to do. If this shall be paid to me at once, I will waive all losses and damages suffered; if not so paid to me, I shall be obliged to take instant measures for its recovery with full compensation for my losses etc.

Respectfully,
(Signed) C. C. BERRYMAN.

131 Endorsed: Notice. C. C. Berryman to Mrs. Owens et als.

I certify that I served a full and true copy of the within notice and demand to each of following persons, to-wit: Etta Owens, G. A. Davisson, J. J. Jaffa, Cashier Citizens Natl. Bank.

This 22nd day of Sept. 1908.

(Signed) C. C. BERRYMAN.

7. Portions of the deposition of R. W. Huie, offered in evidence by defendant, Citizens National Bank, as follows:

Deposition of R. W. Huie.

Int. No. 1. State your name, age and residence.

Ans. to Int. 1. My name is R. W. Huie I am sixty-three years old, and a resident of Arkadelphia, Clark County, Arkansas.

Int. No. 2. What relation are you, if any, to C. C. Berryman?

Ans. to Int. 2. C. C. Berryman is my son-in-law.

Int. No. 3. Please state whether or not you were in Roswell during the time of any of the negotiations that were going on between G. A. Davisson or Mrs. Etta Owens and C. C. Berryman to purchase what is known as the Owens farm East of Roswell.

Ans. to Int. 3. I was there during the latter part of their negotiations.

Int. No. 4. Please state the date of your arrival in Roswell.

Ans. to Int. 4. I arrived in Roswell about September 4th, 1908.

Int. No. 5. During the time that you were at Roswell, please state whether Mrs. Owens, one of the defendants, or her agent G. A. Davisson, made any proposal to you to sell to you the real estate mentioned in the complaint herein known as the Owens ranch a few miles east of Roswell.

Ans. to Int. 5. No, but I made her agent, G. A. Davisson,
132 a proposition to purchase the place, that is, the real estate mentioned in the complaint, known as the Owens Ranch, a few miles east of Roswell.

Int. No. 6. If you have answered the preceding interrogatory that such a proposal was made to you please state whether this was before or after negotiations had been commenced with said Berryman by G. A. Davisson or Mrs. Owens for the sale to him of said property.

Ans. to Int. 6. This was after negotiations had been commenced with the said Berryman, by G. A. Davisson or Mrs. Owens, for the sale to him of said property * * *

On objection of plaintiff and of defendant Etta Owens, joined by her co-executors, the remaining portion of the answer to this interrogatory was excluded.

Objections by the same parties to interrogatories 7, 8 and 9 and the answers thereto were sustained.

Int. No. 10. If you have answered the preceding interrogatory that you moved on to the place then please state whether Mr. Berryman went with you and also occupied the place with you.

Ans. to Int. 10. Mr. Berryman and my daughter his wife, went

with me and my wife to the Owens house, and stayed with us while we were there.

Int. No. 11. Did you obtain possession of the entire Owens farm that was to be sold to you?

Ans. to Int. 11. I obtained possession of the house, furniture, the yard right around the house, chicken lot, cow lot, and the use of one cow to milk; and this is all. I did not obtain possession of the entire farm.

Objections by plaintiff and by defendant Etta Owens joined in by her co-executors, to Interrogatories 12 and 13 and the answers thereto were sustained.

Int. No. 14. Were you present at the time Mr. Berryman placed a check with the Citizens National Bank to be turned over
133 to Mrs. Owens or her agent upon certain conditions being performed by them as to the delivery of title.

Ans. to Int. 14. No.

Interrogatories 15, 16 and 17 not answered by witness.

Int. No. 18. After the proposal of Mrs. Owens to you to purchase the land in question had been rejected by you please state whether a new contract was entered into by Davisson or Mrs. Owens with Berryman for the purchase of this property by said Berryman.

Ans. to Int. 18. Not that I know of.

Int. No. 19. At the time Mrs. Owens proposed that you should buy this property please state what she said, if anything, relative to the negotiations with Mr. Berryman for the purchase of it being ended.

Ans. to Int. 19. I do not remember that she said anything * *

On objection of plaintiff and of defendant Etta Owens, joined by her co-executors, the remaining portion of the answer to Interrogatory 19 was excluded.

Int. No. 20. Do you know who made the suggestion if such suggestion was made that the title to the real estate in question should be perfected by proceedings in the District Court.

Ans. to Int. 20. Mr. Gibbany. * * *

The balance of the answer to this interrogatory was excluded on objection by plaintiff and of Mrs. Etta Owens and her co-executors.

Int. No. 21. If you have answered the preceding interrogatory that you made the suggestion to perfect said title in the District Court then please state whether this was made in contemplation of the Berryman contract to purchase or in contemplation of the proposed contract between yourself and Mrs. Owens.

Ans. to Int. 21. I made no suggestions as to perfecting said title in the district court,—the suggestions that were made, were made with reference exclusively to my proposition to Davisson, and
134 all talk that was had at that time, with reference to titles, was had with reference exclusively to my proposition to purchase said property.

Int. No. 22. Please state who was present when this suggestion was made and also state the place at which it was made.

Ans. to Int. 22. Gibbany, Davisson, C. C. Berryman and myself, are all that I remember, or know. The suggestion, was made in Mr. Gibbany's office.

Int. No. 23. In any of the conversations you had with Mrs. Owens or Mr. G. A. Davisson, her agent, or Mr. Gibbany, her attorney, please state whether or not you represented Mr. Berryman in any way in the alleged contract or trade with Mrs. Owens.

Ans. to Int. 23. I did not represent Mr. Berryman in any way. In all my conversation and transactions I acted for myself alone, and not as agent for anybody.

Cross-interrogatories:

1. It is not a fact that you never came to Roswell until about 30 days after C. C. Berryman contracted for the land he proposed to buy from the defendant, Etta Owens?

Ans. to C. Int. 1. I came to Roswell about Sept. 4th, 1908.

2. Is it not a fact that your purpose in coming to Roswell and New Mexico was to dispose of a number of bonds issued by some land Company in which you had an interest?

Ans. to C. Int. 2. My porpose in going to Roswell, and New Mexico, was to find a suitable location, where I could have good health and not for the purpose of disposing of any bonds.

3. How many of such bonds did you bring with you to Roswell and how many efforts did you make to dispose of them while here?

Ans. to C. Int. 3. I brought one bond, and the mortgage upon which it was predicated.

I made two efforts to purchase property there, and offered the bonds in payment; one to G. A. Davisson, as agent for Mrs.
135 Owens; the other to Mr. Hagerman, at the urgent solicitation of Mr. Davisson, who wanted to secure his commission on the sale of the Hagerman property.

4. Is it not a fact that your first attempt was to put in $75,000.00 of these bonds in payment or part payment on a purchase of orchard lands from J. J. Hagerman?

Ans. to C. Int. 4. No. My first attempt was the proposition to G. A. Davisson with reference to the Owens place.

5. Is it not a fact that you procured the plaintiff to make a proposition to J. J. Hagerman to take $75,000.00 of these worthless bonds off your hands?

Ans. to C. Int. 5. No. The truth is that the plaintiff, G. A. Davisson, begged me to go with him and make the proposition to Mr. Hagerman.

6. After failing on the Hagerman proposition, did you not attempt to make the defendant, Mrs. Owens, take these worthless bonds in lieu of Berryman's notes and is not her refusal to accept the bonds the real cause of Berryman backing out of the trade?

Ans. to C. Int. 6. No; the truth is that I made the proposition to Davisson as agent of Mrs. Owens, with reference to the Owens place, first. And said Davisson later, urged me to go with him and look at the Hagerman, and make him the bond proposition.

The bonds were not to be in lieu of Berryman's notes, and my

proposition had nothing in the world to do with Berryman's deal or trade.

7. Did you not try to get the plaintiff to dispose of these bonds to other parties after failing to work them off on Hagerman and the defendant, Mrs. Owens?

Ans. to C. Int. 7. I did not.

On objection of plaintiff and the defendant, Etta Owens, joined by her co-executors, the remaining portion of the answer to interrogatory 7 was excluded.

136 8. Is it not a fact that Berryman took possession of the property bought from Mrs. Owens on Sept. 10, 1908, and did you not, after that time, try to get Mrs. Owens to accept the bonds, referred to in lieu of Berryman's notes?

Ans. to C. Int. 8. — No; the truth is that I took possession of the house on the Owens place, on Sept. 10th, pending the acceptance or rejection of my proposition to G. A. Davisson as agent of Mrs. Owens for the purchase of the Owens place, which proposition, I know that I made before Sept. 10th 1908, and before I went to the house on the said Owens place.

9. Is it not a fact that all the propositions and negotiations which you had with Mrs. Owens or the plaintiff was with a view of carrying out the terms of the trade made by Berryman with Mrs. Owens with the single change of substituting the said bonds for Berryman's notes?

Ans. to C. Int. 9. No, the truth is that my proposition was an entirely new one, and the terms of the trade pending with Berryman were simply taken as a basis upon which my proposition was based, as I did not think the place could be bought for a less price. My proposition, had nothing in the world to do with the trade pending with Mr. Berryman.

(Signed) R. W. HUIE.

Certificate of Notary Public taking deposition follows.

Counsel for the respective parties having examined the foregoing statement of facts, do hereby stopulate that same may be certified by the Court as provided by law without objection.

(Signed) W. A. DUNN,
Attorney for Plaintiff.
" R. E. LUND,
" W. C. REID,
Attorneys for Defendant, Citizens National Bank.
137 " ED. S. GIBBANY,
Attorney for Defendant, Etta Owens and Her Co-Executors.

Certificate of the Court.

I, William H. Pope, presiding judge of the District Court in and for the County of Chaves, Territory of New Mexico, before whom said above entitled cause was tried to the Court, do hereby certify

that the transcribed notes of the stenographer above set forth, together with the foregoing additions thereto, made under direction of the Court, constitute a full, true and correct statement of all the evidence adduced on the trial of said cause, and of all the rulings of the Court, objections made and exceptions taken during the progress of such trial. And same is hereby certified, approved and ordered filed as a part of the record in said cause.

Done at Portales, N. M., this 10th day of March, A. D. 1910.

(Signed) WILLIAM H. POPE,
Chief Justice of the Supreme Court, and Presiding Judge in and for the Fifth Judicial District, Territory of New Mexico.

Clerk's Certificate.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

I, S. I. Roberts, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, do hereby certify that the above and foregoing 127 pages numbered from 1 to 127 inclusive, with the certificate of the Court attached, were on this date delivered to me by Hon. William H. Pope, judge of the said Court, and ordered filed as a part of the record in cause No. 1414. Chaves County, entitled George A. Davisson v. Citizens National Bank, et al., which is accordingly so done.

138 Witness my hand and official seal on this 10th day of March, A. D. 1910.

[SEAL.] (Signed) S. I. ROBERTS, *Clerk.*

Be it further remembered that on the 14th day of January, A. D., 1910, there was filed in the office of said Clerk, an opinion in said cause, which said Opinion is in words and figures as follows, to-wit:

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

The absence of C. C. Berryman as a party to this cause reduces the range of decision considerably. The case as submitted involves the claim of the plaintiff Davisson against each of the defendants and a claim by the defendant Owens against its co-defendant the Citizens National Bank of Roswell. The claim of each of these

parties, so far as the bank is concerned, depends upon the terms under which the sum of nine thousand one hundred and seventy-three dollars and thirty two cents ($9173.32) is held by that bank. This is not a subject of parole understanding but in the judgment of the Court was settled by a written indorsement made upon escrow envelope by the Cashier of the defendant bank in the presence of and with the concurrence of all parties concerned. The terms of this escrow are as follows:

"Check inclosed to be held in escrow until September 10th when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens Bank and Trust Company Arkl., for examination. No money to be paid over until abstract is approved by purchaser's att'y."

The terms of this indorsement made the bank not a bailee
139 or depository, but the holder of the check in question in escrow with duties as defined by the escrow indorsement. Many of the cases cited by plaintiff which relate to bailees or depositories have no application where, as here, the bank was the agent of both parties and acting under escrow memorandum which specifically defines duties. Did the bank fail in the performance of those duties in delivering the check in question back to Berryman on September 22nd, 1908? Under the indorsement the bank had authority to hold the check in question only until September 10th, when, final settlement was not made, it was in duty bound to return the check to Mr. Berryman, who had left it there. Whatever might be the default of Berryman, the bank had no authority to pay over this money either to Davisson or to the Owens Estate until "abstract is approved by purchaser's attorney", which confessedly was never done. The bank therefore not only was not in default in its duty in returning this check to Berryman, but was proceeding in strict accordance with the terms of its escrow in doing so. While it may be, as contended, that Berryman and the Owens Estate had an understanding by which in consideration of an extension of time to perfect title by Mrs. Owens Berryman was given possession of the ranch and held such possession for some days, this is relevant purely as fixing the rights of Berryman and Mrs. Owens as between each other and is not relevant to any question of liability by the bank. The bank was not a party thereto and even if it had notice thereof it was not at liberty to vary the terms of the escrow agreement without the mutual consent and request of the parties to the escrow communicated to it in such a way as to constitute an enlargement of the terms of the escrow. This latter was done and therefore the bank was bound to proceed according to the original understanding. The Owens Estate could have obviated all of this by an understanding with Berryman communicated to the
140 bank enlarging the terms of the escrow, such understanding being made contemporaneously with the alleged agreement by Berryman enlarging the time for perfecting the title. Having failed to do this, neither the Owens Estate nor plaintiff Davisson, who holds under that Estate, can be heard to complain of the action of the bank. It follows, therefore, that the Owens Estate cannot

recover against the bank nor can the plaintiff Davisson. The latter's order from Mrs. Owens upon the bank gives him no higher standing than Mrs. Owens as that order was not accepted by the bank but was simply a charge against that fund should its payment to Mrs. Owens ever become a matter of duty by the bank under the escrow agreement.

This leaves for determination only the question as to whether Davisson is entitled to recover as against the Owens Estate or Mrs. Owens in this action. The terms of Davisson's agreement with Mrs. Owens for compensation are not developed save in so far as they appear from the contents of the order in favor of Davisson attached to the Amended Complaint. The terms of this order indicate that Davisson was to be paid out of the proceeds of the sale. The sale never having been fully consummated and no money having ever been received by the Owens Estate from the sale, the conditions under which Davisson was to be compensated have never yet reached mat-rity. While there is strong authority, as counsel for plaintiff contend, to the effect that a broker employed to secure a purchaser upon a named compensation is entitled to such compensation when a binding contract is reached between his principal and the purchaser, this rule of course yields to special conditions in the contract and where, as here, it is evident that the compensation was to be paid out of the proceeds of such sale, and where, as here no such proceeds have been as yet received by the broker's principal, there is no ground for recovery as against such principal either for total com-

141 pensation or a percentage upon any sum forfeited by the purchaser.

Much of the testimony here presented would, as above indicated, be relevant in a suit against Berryman, who however, as above stated, is not a party to this case. Whether the fund formerly in the Citizens Bank to the order of Berryman is still there and whether if such fund were attached, Berryman would be liable upon his contract to purchase, need not be here determined, nor of course need it be indicated what the views of the Court would be upon a suit brought in another jurisdiction against Berryman. All that is here determined by the Court is that under the facts as presented the defendant the bank, is liable neither to Davisson nor to Mrs. Owens nor is the latter liable to Davisson.

Objections are reserved upon the record to portions of the testimony of Berryman and Huie. The Court deciding the case has found it unnecessary to consider any of the testimony objected to except that as to the circumstances of the deposit of the papers with the defendant bank. The objections are accordingly sustained except as to the testimony last mentioned.

Judgment pursuant to this opinion may be drawn by counsel and presented for signature, the bank not to be absolved from any claim of liability nor to change the status of any fund in its possession until judgment is signed.

(Signed) WM. H. POPE, *Judge.*

Dated this January the 11th, 1910.

Endorsement: 1414. In the District Court, Chaves County, George A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, New Mexico, and Etta Owens, Defendants. Opinion. Fifth
142 Judicial District Court, County of Chaves. Filed in my Office, Jan. 14, 1910. S. I. Roberts, Clerk. By —— ——, Deputy.

Be it further remembered that on the 5th day of February, A. D. 1910, there was filed in the office of said Clerk, and entered of record on page 169 et seq. in Book H of Court records of Chaves County, New Mexico, a Judgment in said cause which said Judgment is in words and figures as follows, to-wit:

District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Judgment.

This cause having come on to be heard by the Court upon the pleadings and evidence and the argument of counsel, and the Court having filed an opinion in said cause setting forth its findings of fact and conclusions of law, and plaintiff Davisson and Defendant Etta Owens having filed a motion herein for a rehearing and the Court having heard the argument of respective counsel on said motion and being fully advised in the premises, doth overrule said motion.

And this cause now coming on for judgment the Court doth find:

1. That the liability of the Defendant, Citizens National Bank to the plaintiff and to Cross-complainant Etta Owens, is to be determined by the terms of an escrow agreement which are as follows:

"Check enclosed to be held in escrow until September
143 10th when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens National Bank & Trust Company, Ark. for examination. No money to be paid over until abstract is approved by purchaser's attorney."

2. That no abstract "approved by purchaser's attorney" was presented to said Defendant bank on or prior to September 10th.

3. That after said date, September 10th, it became the duty of said defendant bank to deliver said check, or the proceeds thereof to C. C. Berryman, one of the parties to the escrow agreement, upon demand.

4. That no sale of the lands mentioned in the complaint herein was consummated between Defendant Etta Owens and one C. C.

Berryman mentioned in the complaint as the intended purchaser of such lands so as to entitle plaintiff to his commission.

5. That the defendant bank was not a party to any subsequent arrangement, contract or extension of time between the Defendant Etta Owens and Berryman or Plaintiff George A. Davisson and Berryman.

6. That the order from Mrs. Owens given to plaintiff Davisson upon the defendant bank was not accepted by said bank.

The Court further finds as its conclusions of law as follows:

1. That the Defendant bank was not the bailee or depository of the check placed with it by one Berryman but that it was the holder thereof in escrow and said bank was the agent of both parties acting under escrow memorandum.

2. It was the duty of the bank to return said check or the proceeds thereof to said Berryman upon demand of said Berryman if an abstract to said land had not been presented to said bank on or prior to September 10th "approved by Purchaser's attorney."

144 3. The Defendant bank had no authority to pay over the check or the money derived therefrom to either Plaintiff Davisson or co-defendant Etta Owens or the Owens estate until an "abstract was presented approved by purchaser's attorney."

4. Defendant bank was not bound by any understanding for an extension of time that might have been made between Berryman and Etta Owens or the Owens estate not contained in said escrow memorandum.

5. Defendant bank was not at liberty to vary the terms of said escrow agreement without the mutual consent and request of the parties to the escrow communicated to it in such a way as to constitute an enlargement of the terms of the escrow, which was not done.

6. That Plaintiff Davisson can not recover a commission for the sale of said land described in the complaint herein no money having been paid to Etta Owens or the Owens estate on any such sale.

It is Therefore Ordered, Adjudged and Decreed by the Court that the Plaintiff George A. Davisson take nothing by his suit against the defendant, Citizens National Bank, of Roswell, New Mexico and Etta Owens and that said complaint be and the same is hereby dismissed at the cost of plaintiff to be taken and taxes by the Clerk of this Court for which execution shall issue.

It is Further Ordered, Adjudged and Decreed by the Court that the said Defendant Etta Owens take nothing by her cross complaint against the Defendant the Citizens National Bank of Roswell, New Mexico and that said bank recover of and from said Etta Owens its costs in this behalf expended as to said cross complaint for which execution shall issue and that said cross complaint be and is hereby dismissed by the Court.

And Plaintiff Davisson and Defendant Etta Owens excepting to the action of the Court in rendering the foregoing judgment,

145 and said plaintiff and said Defendant Etta Owens having moved the Court for an appeal to the Supreme Court of the Territory from said judgment, it was agreed by the respective coun-

sel for each and every of the parties hereto that said motion might be considered by the Court as in term time, and that citation on such appeal be waived.

It is ordered by the Court that an appeal from the said judgment to the Supreme Court of the Territory of New Mexico be and the same is hereby allowed to Plaintiff George A. Davisson and Defendant Etta Owens as to her Cross-Complaint, this motion being made and order of appeal allowed in the presence of counsel for Defendant the Citizens National Bank of Roswell, New Mexico.

(Signed) WM. H. POPE, *Judge.*

Dated this 4th day of February, A. D. 1910 at Roswell, New Mexico.

Endorsement: 1414. District Court, Chaves County, New Mexico. George A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, New Mexico, and Etta Owens, Defendants. Judgment. Fifth Judicial District Court, County of Chaves. Filed in my office, Feb. 5, 1910. S. I. Roberts, Clerk, by —— ——, Deputy. H. 169, et seq.

Be it further remembered that on the 15th day of February, A. D. 1910, there was filed in the office of said Clerk, an Appeal
146 Bond in said cause, which said Appeal Bond is in words and figures as follows, to-wit:—

Appeal Bond.

In the District Court, Chaves County, New Mexico.

Cause No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Whereas, on the 5th day of February, 1910, final judgment in the above-entitled and numbered cause was rendered by the Honorable District Court of said Chaves County in favor of all defendants as against the plaintiff and it was ordered, adjudged and decreed by the Court that plaintiff take nothing by his suit and that his complaint be dismissed at his cost; and,

Whereas, the plaintiff has appealed from the judgment so rendered to the Honorable, the Supreme Court of the Territory of New Mexico; therefore,

Know all men by these presents, that we, George A. Davisson, the plaintiff above named, as principal, and K. S. Woodruff and W. C. Lawrence as sureties, are held and firmly bound to the Citizens' National Bank of Roswell, New Mexico, a corporation, and to Etta Owens and her co-executors herein appearing, defendants in said

cause, for the payment of all costs of this action; and the subscribers hereto undertake and agree that said George A. Davisson, appellant, shall pay all costs that may be adjudged against him on said appeal and for which, he shall become liable therein. We further agree that judgment may be entered by Supreme Court against both the principal herein and his sureties for all costs that may be adjudgmed against said appellant.

In faith whereof, we hereunto subscribe our names, at
147 Roswell, New Mexico, on this 15th day of February, 1910.

(Signed) G. A. DAVISSON.
(Signed) K. S. WOODRUFF.
(Signed) W. C. LAWRENCE.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 15th day of February, 1910, before me the undersigned Clerk of the Fifth Judicial District Court of the Territory of New Mexico, within and for the county of Chaves, personally appeared George A. Davisson, K. S. Woodruff and W. C. Lawrence to me personally known to be the persons whose names are subscribed to the foregoing bond as principal and sureties thereon, and severally acknowledged to have voluntarily signed and executed the same for the uses and purposes therein expressed; and the said K. S. Woodruff and W. C. Lawrence, sureties on said bond being first duly sworn, each made oath that he is worth the sum of Five hundred (500) dollars, over and above all his just debts and liabilities, and the amount by law exempt from execution.

The foregoing bond is hereby taken and approved by me.

Witness my hand and the seal of said court on the day and year in this certificate first above written.

[SEAL.] (Signed) S. L. ROBERTS, *Clerk.*

Endorsement: 1414. In District Court, Chaves Co., N. M. George A. Davisson, Plaintiff, v. Citizens National Bank of Roswell,
148 New Mexico, et al., Defendants. Appeal Bond. Fifth Judicial District Court, County of Chaves. Filed in my office, Feb. 15, 1910. S. I. Roberts, Clerk, By —— ——, Deputy.

Be it further remembered that on the 19th day of February, A. D. 1910 there was filed in the office of said Clerk, a Cost Bond on Appeal which said Cost bond is in words and figures as follows; to-wit:—

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and ETTA OWENS, Defendants.

Cost Bond on Appeal.

Whereas, on the 5th day of February, 1910, judgment was rendered and entered in the above cause in said Court against Etta Owens, and the estate of S. B. Owens, deceased, denying her right and the right of the estate of S. B. Owens, deceased, of, in and to a certain sum of $9173.00 deposited in said Citizens National Bank, defendant, and assessing the costs against the said Etta Owens, and said estate, and

Whereas, said Etta Owens, for the estate of S. B. Owens, deceased has appealed from said judgment of Chaves County to the Supreme Court of the Territory of New Mexico.

Therefore, know all men by these presents, That, we, Etta Owens, as principal and Nell Chewning and S. M. Owens, as sureties are held and firmly bound unto the said George A. Davisson, Plaintiff, and the Citizens National Bank, Defendant in the matter involved in said suit by Etta Owens to pay all costs that may be ad-
149 judged against Etta Owens on said appeal.

In witness whereof, we have hereunto set our hands this 19th day of Feb. A. D. 1910.

(Signed) ETTA OWENS, *Principal*,
(Signed) NELL CHEWNING,
(Signed) S. M. OWENS, *Sureties*.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 19th day of Feb. A. D. 1910, before me personally appeared Nell Chewning and S. M. Owens, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the foregoing instrument as their free act and deed. And the said Nell Chewning and S. M. Owens, as sureties on said bond did further state upon oath that they are each worth the sum of One Thousand Dollars over all just debts and liabilities and property exempt from execution.

Witness my hand and seal the day and year in this certificate first above written.

(Signed) J. D. BELL,
[SEAL.] *Notary Public.*

My commission expires, May 14th, 1911.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 19 day of Feb. 1910, before me personally appeared Etta Owens, as principal to the above Bond, to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

Witness my hand and seal the day and year in this cer-
150 tificate first above written.

(Signed) J. D. BELL,
[SEAL.] *Notary Public.*

My Commission expires May 14th, 1911.

Above bond taken and approved as to form and sufficiency this 19th day of Feby., 1910.

(Signed) S. I. ROBERTS, *Clerk.*

Endorsement: 1414. George A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, New Mexico and Etta Owens, Defendants. Cost Bond on Appeal. Fifth Judicial District Court, County of Chaves. Filed in my office, Feb. 19, 1910. S. I. Roberts, Clerk. By —— —— Deputy. Ed. S. Gibbany, Att'y for Owens Estate, Roswell, New Mexico.

Clerk's Certificate.

TERRITORY OF NEW MEXICO,
Fifth Judicial District, County of Chaves, ss:

I, S. I. Roberts, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, do hereby certify that the above and foregoing 180 pages contain a true and perfect transcript of the record and proceedings as called for by the præcipe immediately following the title page hereof, and of the stenographer's transcript in said cause, and the certificate of the Court signing and approving said steneg-
151 rapher's transcript in said cause, lately pending in said Court, being No. 1414 on the civil docket of Chaves County wherein George A. Davisson was plaintiff and Citizens National Bank of Roswell and Etta Owens et al., were defendants, as the same remains of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Roswell, N. M., this 2 day of May, A. D. 1910.

[SEAL.] S. I. ROBERTS,
Clerk of Said Court.

Clerk's Certificate of Costs.

TERRITORY OF NEW MEXICO,
Fifth Judicial District, County of Chaves, ss:

I, S. I. Roberts, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, do hereby certify that the costs in cause No. 1414 on civil docket of said Court, George A. Davisson, vs. Citizens National Bank, et al., as shown by the docket in said cause, the bill of the clerk for transcript herein, and the stenographer's bill for transcript of testimony, are 125.90.

Witness my hand and the seal of said Court, this 2 day of May, A. D. 1910.

[SEAL.] S. I. ROBERTS, *Clerk.*

152 Be it remembered that on the 3rd day of August, A. D. 1911, there was filed in the office of the Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, in cause No. 1414 on the civil docket of said Court, wherein George A. Davisson is plaintiff and Citizens National Bank of Roswell, et al., are defendants, a præcipe for transcript, which said Præcipe for Transcript in said cause is in words and figures as follows, to-wit:—

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK et al., Defendants.

To the Clerk of the District Court of Chaves County:

Final judgment on re-trial having been rendered in the above entitled cause for which an appeal has been taken by the Defendant Citizens National Bank, and said appellant being desirous that said judgment shall be reviewed by the Supreme Court of the Territory of New Mexico and a stipulation having been entered into by the parties hereto by respective counsel that the record heretofore made up in this cause on former appeal, with the addition of the entire record of proceedings and papers filed subsequent to such appeal, shall constitute the record for this present appeal in the Supreme Court, you are therefore hereby requested to make out a transcript of the proceedings had in this cause in the District Court of Chaves County including and subsequent to the mandate of the
153 Supreme Court heretofore entered, and embodying therein all proceedings shown by the record proper, and the following papers, to-wit:

1. This præcipe.
2. Stipulation for Re-trial.
3. Mandate of the Supreme Court.
4. Request for Special Findings.
5. Opinion.
6. Judgment.
7. Motion for Appeal.
8. Order Allowing Appeal.
9. Citation.
10. Supersedeas Bond.
11. Stipulation as to the Record.

It is the intention of said defendants and appellants to review all questions that might arise from the entire record in this cause, as provided in last said stipulation.

Please also attach the usual certificate of costs.

(Signed) W. C. REID &
J. M. HERVEY,
Attorneys for Citizens National Bank of Roswell, Defendant and Appellant.

Endorsement: No. 1414. District Court County of Chaves. George A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, et *tl.* Defendants. Præcipe for Transcript. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed Aug. 3, 1911, in my office. S. I. Roberts, Clerk. By —— —— Deputy. Reid & Hervey, Roswell, New Mex. Attorneys for Defendant Bank.

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Be it further remembered that on the 25th day of February, A. D. 1911, there was filed in the office of said Clerk, a Stipulation in said cause, which said Stipulation is in words and figures as follows, to-wit:—

In the District Court, Chaves County, New Mexico.

Cause No. 1414.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK OF ROSWELL, N. M., et al., Defendants.

Stipulation.

It is agreed by and between the parties to the foregoing cause, as follows, to-wit:

1. That the plaintiff, George A. Davisson, and the defendant Etta Owens, shall pay to the Clerk of the Supreme Court, a balance of $11.00 due as costs, and that the mandate of the Supreme Court remanding the case to the district court may issue at once.

2. It is further stipulated and agreed that said cause shall be

heard without delay, after the mandate shall have issued, and that the former pleading and evidence in the case, (the latter as shown by the transcribed notes of the stenographer the exhibits thereto and the depositions on file, the same as embodied in the printed record on appeal) shall be submitted to the court for its findings of law and fact; it being the intention hereof that this case shall be submitted to and tried by the court on the pleading and
155 evidence produced at the first trial, and the parties shall not introduce new evidence.

4. This stipulation shall be filed with the clerks of both the Supreme and the District Courts.

Witness our hands this 25th day of February, 1911.

(Signed) W. A. DUNN,
Attorney for Plaintiff.
ED. S. GIBBANY,
Attorney for Etta Owens et al.
REID & HERVEY,
Attorneys for Citizens National Bank.

Endorsement: No. 1414. Chaves County District Court. George A. Davisson v. Citizens National Bank of Roswell, N. M., et al. Stipulation. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed Feb. 25, 1911, in my office. S. I. Roberts, Clerk, By —— —— Deputy.

Be it further remembered that on the 13th day of March, A. D. 1911, there was filed in the office of said Clerk, a mandate of the Supreme Court in said cause, which said Mandate from the Supreme Court is in words and figures as follows, to-wit:—

THE TERRITORY OF NEW MEXICO:

To the District Court sitting within and for the —, Greeting:

156 Whereas, in a certain cause lately pending before you, wherein George A. Davisson was plaintiff and Citizens National Bank of Roswell and Mrs. Etta Owens, et al., were defendants, by your consideration in that behalf, judgment was entered against the said defendants & plaintiffs, and

Whereas, The said cause and judgment were *were* afterward brought into our Supreme Court for review by Appeal, whereupon such proceedings were had in said Supreme Court that at the January 1910 term thereof, on the thirty-second day of said term, the same being August 30th, 1910, it was considered that the judgment aforesaid, by you in form given, be reversed and that the said cause be remanded to you with directions to proceed in accordance with the views expressed in the opinion of the court.

Now, Therefore, You are hereby commanded to reinstate said cause upon your docket and proceed in accordance with the views of the court expressed in the opinion of the court (as per copy hereto attached).

Witness, The Honorable William H. Pope, Chief Justice of the Supreme Court of the Territory of New Mexico, and the Seal of said Court, this 28th day of February, A. D. 1911.

[SEAL.] (Signed) JOSE D. SENA, *Clerk.*

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1332.

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS et al., Defendants, Appellants,

vs.

CITIZENS NATIONAL BANK OF ROSWELL, N. M., Defendant, Appellee.

Appeal from District Court, Chaves County.

157 *Syllabus.*

1. Under the circumstances set out in the statement of facts, the appellee as holder of an escrow was not justified in delivering it to either party.

Statement of Facts.

The Appellant Owens and one Berryman entered into a contract for the sale of lands, the appellant Davisson acting as agent for Owens,—The Conditions of the Contract are not material here. After signing up the contract, Berryman drew a check upon an Arkansas bank in favor of Davisson, as agent, for $9,173.32, the check was placed in an envelope with the contract of sale and the parties in company went to the appellee bank and delivered the envelope containing the check and contract to the cashier of the bank, who, as the court found, in the presence and with the concurrence of all the parties, made the following written endorsement on the envelope:—

"Check enclosed to be held in escrow until September 10th, when final settlement is to be made, Deed and Abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens Bank and Trust Company, Arkadelphia, Ark., for examination. No money to be paid until abstract is approved."

(Signed) J. J. JAFA, *Cashier.*

Berryman thereafter made demand upon the bank for the return of the money, the check in the meantime having been cashed and the money in the hands of the bank. The bank called upon the appellants for their consent, which, for various reasons, they refused to give, but the bank delivered the money to Berryman. Suit was brought by Davisson against the Bank to recover his commission on the sale. Mrs. Owens and her co-executors of the estate of Solon M. Owens, deceased, were made parties defendants. They answered

and filed a cross-complaint against the bank and asked judg-
158 ment for the money. The case was tried by the court without a jury. Judgment for the appellee and appellants bring this appeal.

Opinion of the Court.

MECHEM, *J.:*

The court below held that the bank's liability was fixed and limited by the memorandum above mentioned, and that as no abstract "approved by purchaser's attorney" was presented to the bank on or prior to September 10th, that after said date "it became the duty of the bank to deliver the said check or its proceeds to C. C. Berryman, one of the parties to the escrow agreement upon demand."

Now, it is admitted that the bank was acting as agent for both parties as far as the escrow itself was concerned, and the question is, did the bank act as it should have acted, or did it fail in its duty to either party?

Admitting the correctness of this holding for the sake of argument, the question then is, did the bank fulfill its duty to the appellants as fixed by the memorandum? To this question we think the reply should be in the negative, for the reason that nowhere in the memorandum was the bank authorized to make any delivery of any paper, money or anything.

Had the appellants both agreed that Mr. Berryman should have his money or check back, then the bank would have been relieved from any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken side, and when it failed to secure appellant's consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance.

However, it took sides in this matter and will be held as it should be, to have acted at its peril and to be responsible to appel-
159 lants for the fund if they can show a right to same under contract made with Berryman, either in its original form or as amended by the parties to it.

The law governing the duties of the Bank in this case is well stated by Page in his work on Contracts.

"The depository of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor save upon the fulfilment of the agreed conditions deliver it to the latter without the former's consent." 2 Page Contracts 585.

There happened no condition as set forth in the memorandum, upon the fulfilment of which, or failure to fulfill, the bank was directed to return the papers to either party.

We do not deem it necessary upon this appeal to decide any of the other questions raised by the brief of appellants, except that the appellee will be held to be responsible to the appellant if they, upon a retrial of this cause, shall sustain a right to the money the

bank had belonging to Berryman and paid over to him in violation of its duty to appellants.

The judgment of the lower court is reversed and remanded with instructions to reinstate the cause and proceed in accordance with the views expressed in this opinion.

MERRITT C. MECHEM,
Associate Justice.

We Concur:
JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*
EDWARD R. WRIGHT, *A. J.*

Pope, C. J., having heard this cause below, did not participate in this opinion.

August 30, 1910.

160 Endorsement: No. 1414. In the District Court, Chaves County, New Mexico. George A. Davisson, Plaintiff, v. Citizens National Bank, Mrs. Etta Owens, et al. Mandate of the Supreme Court. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed Mar. 13, 1911, in my office. S. I. Roberts, Clerk. By —— ——, Deputy.

Be it further remembered that on the 3rd day of May, A. D. 1911, there was filed in the office of said Clerk, requests for special findings in said cause, which said Requests for Special Findings are in words and figures as follows, to-wit:

District Court, Chaves County, New Mexico.

No. —.

GEORGE A. DAVISSON, Plaintiff,
vs.
CITIZENS NATIONAL BANK OF ROSWELL and FAYETTA OWENS, Defendants.

The Defendant Bank requests the Court to make findings of fact on the following questions:

1.

Was it the intention of the parties that the Berryman check for $9,173.32 was to be an absolute payment on the purchase price of the land?

2.

161 Was it the intention of the parties that the check for $9,173.32 was to remain in escrow until September 10th pending the furnishing an abstract of title, a favorable report thereon and final settlement?

3.

Was the contract of sale ever delivered to either of the parties thereto, by their mutual consent?

4.

Were the conditions of the escrow agreement so far as the bank knew, ever performed?

5.

Were deed and abstract placed in escrow or delivered to the Bank by September 10th?

6.

Was the abstract of title ever approved to the Bank's knowledge?

7.

Does the evidence show that the officers of the Bank had any knowledge of the contents of the contract that was in escrow envelope other than what appeared in the escrow agreement written on the back of the envelope?

8.

Prior to September 10th did the officers of the Bank have any knowledge of any agreement between Mr. Berryman and Mrs. Owens extending the time to perfect title?

9.

Did Berryman ever give his consent to the Bank to extend the time stipulated in the escrow agreement?

10.

Did Berryman after September 10th demand the return of the check he had placed in escrow?

11.

Had Berryman ever given his consent that the check should be sent in for collection?

162 Defendant bank requests the court to make conclusions of law upon the following questions:

1. What contract was it that burdened the bank with any duty as between Berryman and Mrs. Owens?

2. When one deposits money or check with a bank to be held in escrow until a third party performs some specified act within a given

time and such third party does not perform such act within such time, and it is not mutually agreed and brought to the knowledge of the bank that the time within which such act shall be performed shall be extended, what is the duty of the bank?

3. Is a written instrument the terms of which provides for the purchase or sale of land ever a binding contract until delivered by the mutual consent of the parties?

4. Can such an instrument as mentioned in the preceding question be legally delivered after being placed in escrow except that the conditions of the escrow agreement *to* be performed or by the mutual agreement of the parties to such contract and escrow agreement?

5. Are the provisions of the contract of sale as set forth in the complaint material in this case as between the parties that are before the Court?

6. Did the Berryman check which was placed with the Bank become a trust fund for Mrs. Owens?

(Signed) REID & HERVEY,
Attorneys for Def't Bank.

Endorsement: No. 1414. In the District Court, Chaves County, New Mexico. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, and Fayetta Owens, Defendants. Requests for 163 Special Finding. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed May 3, 1911, in my office. S. I. Roberts, Clerk. By —— ——, Deputy. Reid & Hervey, Roswell, N. M., Attorneys for Defendant Bank.

Be it further remembered that on the 20th day of July, A. D. 1911, there was filed in the office of said Clerk, an opinion in said cause, which said Opinion is in words and figures as follows, to-wit:

In the District Court, Chaves County, New Mexico.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL and FAYETTA OWENS, Defendants.

Opinion.

Upon the original trial of the cause it was held by the Court that the liability of the bank was to be tested by the terms of the escrow memorandum and that this latter authorized the return of the money to Berryman after September 10th, 1908. The Supreme Court on appeal has held this view to be erroneous and has declared the true rule under the circumstances to be that the bank is responsible to Davisson and Owens if these "can show a right to the fund under the contract made with Berryman either in its original

form or as amended by the parties to it." Bowing to this as the law of the case it only remains therefore to determine upon the
164 present submission—the cause being presented upon the same testimony as offered on the former trial—whether if Berryman were a party to the suit there could be a recovery against him. If so, under the Supreme Court's holding, the bank is liable, otherwise not. It it to be assumed under such circumstances that the Supreme Court in remanding the cause considered that the transaction with Berryman as pleaded constituted a cause of action against the bank, because a sufficient cause of action against Berryman: otherwise the court's holding upon the former trial would have been mere harmless error and would not have necessitated a reversal. It is further conceived that the purpose of remanding the cause was for the Court to determine whether the facts sustained these allegations, and if the latter, then a judgment would follow in favor of plaintiff. Proceeding to the duty of determining the facts the Court finds:

(1) That the Owens Estate had up to September 10th, 1908, failed to make good title to Berryman; (2) That at or about that date a further conference was held in which is was orally agreed between Berryman and the Estate that the latter should have thirty or forty days in which to secure an order of Court; (3) That in consideration of this said estate went immediately to secure said order, at considerable expense for attorney's fees, expenses, etc., and did secure the same on October 5th, 1908; (4) That further, in consideration of this, Berryman who was stopping on expense at the hotel in Roswell, was to be given and was given by the Owens Estate possession of the premises on September 10th, 1908; (5) That he remained in possession thereof, exercising acts of ownership thereon until September 22nd, 1908; (6) That on said date he repudiated and abandoned said contract and left the Territory; (7) That at said date the time agreed upon for securing an order of sale through the Courts had not expired; (8) That the abandon-
165 ment of the contract was without just cause and subjected Berryman to a forfeiture of the escrow money in the hands of the bank. This condition of things under the opinion of the Supreme Court renders Berryman liable, and Court so finds.

Responding to the request of the Citizens National Bank for findings of fact, the Court finds as follows in response to the several interrogatories propounded:

1. No.
2. Yes.
3. No.
4. No.
5. No.
6. No.
7. No.
8. No.
9. No.
10. Yes.
11. No.

As to the request for findings of law made by the defendant bank, these, so far as material and in proper form, are, with the possible exception of request No. 6, covered by the opinion of this Court announced on the former trial, which opinion, save so far as overruled by the Supreme Court's opinion, is reiterated and reannounced as this Court's view of the law as applied to the facts. To Request No. 6 for findings of law, the Court finds that the Berryman check was deposited in escrow, the proceeds to be used as a first payment on the land when, if ever, the terms of the escrow were complied with. In this sense and no other it was a trust fund for Mrs. Owens.

For the reasons above stated let judgment be drawn for Davisson for the amount of his order and in favor of the Owens estate for the balance of the deposit.

Roswell, N. M., this July 20th, 1911.

(Signed) WM. H. POPE, *Judge.*

166 Endorsement: No. 1414. In the District Court, Chaves County, New Mexico. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, and Fayetta Owens, Defendants. Opinion. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed July 20, 1911, in my office. S. I. Roberts, Clerk, By —— ——, Deputy.

Be it further remembered that on the 22nd day of July, A. D. 1911, there was filed in the office of said Clerk, and entered of record in Book "I" of Court Records of said County, on pages 366 and 367 thereof, a Judgment in said cause, which said Judgment is in words and figures as follows, to-wit:

In the District Court, Chaves County, New Mexico.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,

v.

CITIZENS NATIONAL BANK OF ROSWELL et al., Defendants.

Judgment.

The above entitled cause being regularly submitted and all issues of fact as well as of law having been tried to and determined by the Court by consent of the parties on file, and the Court's findings of fact and the law being embodied in a written opinion
167 heretofore filed in this cause on the 20th day of July, 1911, such cause came on this day for the entry of final judgment therein.

And it appearing to the Court that the defendant, Citizens National Bank of Roswell, New Mexico, is justly indebted to the plaintiff in the sum of Five Thousand ($5,000.00) Dollars, with 6 per cent. per annum interest thereon from the 26th day of October, 1908, amounting to Five Thousand Eight Hundred Twenty-one and

65-100 ($5821.65) Dollars, and that said Defendant Bank is justly indebted to the Defendants, Etta Owens, James W. Owens, and Adolph Andrews, as executors of the estate of Solon B. Owens, deceased, in the sum of four Thousand One Hundred Seventy-three and 32-100 ($4173.32) Dollars, with 6 per cent. per annum interest thereon from the 26th day of October, 1908, amounting to Four Thousand Eight Hundred Fifty-nine and 16-100 ($4859.16) Dollars, and that judgment should be awarded accordingly.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff George A. Davisson do have and recover of and from the Defendant Citizens National Bank of Roswell, New Mexico, a National Banking Corporation, said sum of Five Thousand Eight Hundred Twenty-one and 65-100 ($5821.65) Dollars, with 6 per cent. per annum interest thereon, and all costs by him in this behalf expended for all which execution may be issued, and it is further Ordered, Adjudged and Decreed by the Court that the Defendants Etta Owens, J-mes W. Owens and Adolph Andrews, as executors of the Estate of Solon B. Owens, deceased, do have and recover of and from the Defendant, said Citizens National Bank, the aforesaid sum of Four Thousand Eight Hundred Fifty-nine and 16-100 ($4859.16) Dollars, with 6 per cent. per annum interest thereon, and all costs by them in this behalf expended, for all of which execution may issue, to all of which judgment and every
168 part thereof the Defendant Citizens National Bank of Roswell duly excepted.

At Roswell, this July 22, 1911.

(Signed) WM. H. POPE, *Judge.*

Endorsement: No. 1414. In the District Court, Chaves County, New Mexico. Judgment. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, et al., Defendants. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed July 22, 1911, in my office, S. I. Roberts, Clerk, By —— ——, Deputy. —— ——, Attorney for Plaintiff, Roswell, New Mexico. Recorded in Book I, p. 366-7.

Be it further remembered that on the 25th day of July, A. D. 1911, there was filed in the office of said Clerk, a Motion for Appeal in said cause, which said Motion for Appeal is in words and figures as follows, to-wit:—

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL et al., Defendants.

169 *Motion for Appeal.*

The defendant, Citizens National Bank of Roswell, New Mexico, by its attorneys Messrs. Reid & Hervey, moves the court for an appeal from the judgment of the District Court of Chaves County, in said cause, to the Supreme Court of the Territory of New Mexico, and for grounds of said appeal states: that it is aggrieved by the final judgment in said cause from which it prays an appeal.

(Signed) REID & HERVEY,
Roswell, New Mexico, Attorneys for Said Defendant and Appellant.

Endorsement: No. 1414. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell et al., Defendants. Motion for Appeal. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed July 25, 1911, in my office, S. I. Roberts, Clerk, By —— ——, Deputy. Reid & Hervey, Roswell, New Mex., Attorneys for Defendants.

Be it further remembered that on the 25th day of July, A. D. 1911, there was filed in the office of said Clerk, and entered of record on page 370 in Book "I" of Court Records of said County, an Order Allowing Appeal in said cause, which said Order
170 Allowing Appeal is in words and figures as follows, to-wit:—

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL et al., Defendants.

Order Allowing Appeal.

This cause now coming on for hearing upon motion of the defendant, Citizens National Bank of Roswell, for an appeal in the above entitled cause, and it appearing to the court that said defendant is aggrieved by the final judgment entered herein.

It is ordered by the court that an appeal in said cause be, and the same hereby is, granted to said defendant from the final judg-

ment, in the District Court of Chaves County to the Supreme Court of the Territory of New Mexico.

(Signed) WM. H. POPE, *Judge.*

O. K. as to form.

(Signed) ED. S. GIBBANY,
Att'y for Owens Estate.

(Signed) W. A. DUNN,
Att'y for Plaintiff.

Endorsement: No. 1414. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell et al., Defendants. Order Allowing Appeal. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed July 25, 1911, in my office, S. I. Roberts, Clerk, By —— ——, Deputy. Reid & Hervey, Roswell, New Mexico, Attorneys for Defendants. Recorded in Book I, p. 370.

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Be it further remembered that on the 25th day of July, A. D. 1911, there was filed in the office of said Clerk, a Citation on Appeal in said cause, which said Citation on Appeal is in words and figures as follows, to-wit:

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK OF ROSWELL et al., Defendants.

Citation on Appeal.

To George A. Davisson, plaintiff in the above entitled cause, and Etta Owens, a defendant in said cause, Greeting:

You, and each of you, are hereby cited to appear in the Supreme Court of the Territory of New Mexico, and answer to an appeal from the final judgment of said District Court, which has been taken in the above entitled cause by the Defendant Citizens National Bank of Roswell, New Mexico, to the Supreme Court of the Territory of New Mexico, such appearance to be on or before the return day of such appeal.

In witness whereof I have hereunto set my hand and official seal, this 25th day of July, 1911.

[SEAL.] (Signed) S. I. ROBERTS, *Clerk,*
By GEO. L. WYLLYS, *Deputy.*

172 TERRITORY OF NEW MEXICO,
County of Chaves, ss:

I, C. L. Ballard, Sheriff of Chaves County, hereby certify that this citation came to hand on the 25 day of July, 1911, and was duly served by me upon W. A. Dunn, Attorney for Plaintiff George A. Davisson and upon Ed. S. Gibbany, Attorney for one of the defendants, Etta Owens, by the delivery to each of said attorneys a true copy of this citation at Roswell, Chaves County, New Mexico, on the 25 day of July, 1911.

(Signed) C. L. BALLARD, *Sheriff,*
By C. R. YOUNG, *Deputy.*

Dated this 25 day of July, 1911.

Fees $2.50.

Endorsement: No. 1414. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, et al., Defendants. Citation on appeal. Fifth Judicial District, Territory of New Mexico, County af Chaves. Filed July 25, 1911, in my office. S. I. Roberts, Clerk, By ——— ———, Deputy. Reid & Hervey, Roswell, New Mexico, Attorneys for Defendants.

Be it further remembered that on the 31st day of July,
173 A. D. 1911, there was filed in the office of said Clerk a Supersedeas Bond in said cause, which said Supersedeas Bond is in words and figures as follows, to-wit:—

In the District Court, Chaves County.

No. 1414.

GEORGE A. DAVISSON, Plaintiff,
v.
CITIZENS NATIONAL BANK et al., Defendants.

Supersedeas Bond.

Know all men by these presents that we, the Citizens National Bank of Roswell, a banking corporation organized and existing under the National Banking Laws, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound to George A. Davisson and Fayetta Owens in the penal sum of $22,000.00, for the payment of which well and truly to be made we bind our respective corporations, successors and assigns, jointly and severally, firmly by these presents.

Signed this 31st day of July, 1911.

The condition of the foregoing obligation is such, however, that; Whereas final judgment has been entered in the District Court, of Chaves County, New Mexico, against the above bounden principal in the sum of $10680.81 in the above entitled cause, and;

Whereas said above bounden principal and Defendant Bank in the above entitled cause has been granted an appeal in this cause from said District Court of Chaves County to the Supreme Court of the Territory of New Mexico and a stay of execution on said judgment pending such appeal, provided that good and sufficient supersedeas bond be furnished as required by law, now:

Therefore if the above bounden principal or any person for it shall pay such judgment and all costs which may be ad-
174 judged against it in case such appeal be dismissed or said judgment be affirmed and they prosecute such appeal with due diligence, then this obligation to be null and void and of no effect, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands by the authority of the respective Board of Directors of the corporations executing this bond this 31st day of July, 1911.

CITIZENS NATIONAL BANK OF ROSWELL,

(Signed) By JNO. W. POPE, *Its President.*

[Corporate Seal.]

Attest:

(Signed) J. J. JAFFA, *Cashier.*

UNITED STATES FIDELITY & GUARANTY CO.,

(Signed) By W. C. REID AND E. G. MINTON,

Its Attorneys in Fact.

[Corporate Seal.]

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 31st day of July, 1911, before me duly appeared John W. Poe, to me personally known, and being by me duly sworn did say that he is the President of the Citizens National Bank of Roswell, a corporation, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by the authority of its Board of Directors, and said John W. Poe acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof I have hereunto set my hand and seal on the day and year in this certificate first above written.

(Signed) OLIVER H. SMITH,
[SEAL.] *Notary Public.*

My Commission Expires Jan. 21, 1913.

175 TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 31st day of July, 1911, before me personally came E. G. Minton and W. C. Reid, to me known to be the attorneys in fact of the United States Fidelity and Guaranty Company, a corporation

described in and who executed the foregoing bond of the Citizens National Bank of Roswell as surety thereon, and they acknowledged that they executed the same as the free act and deed of said United States Fidelity and Guaranty Company and that the seal affixed to said bond is the corporate seal of said Company and is hereto affixed by order and authority of the Board of Directors of said company and that they signed their names thereon by like order and authority as Attorneys in Fact of said company.

In witness whereof I have hereunto set my hand and seal on this day and year in this certificate first above written.

[SEAL.] (Signed) S. I. ROBERTS, *Clerk.*

Endorsement: No. 1414. District Court, County of Chaves. Geo. A. Davisson, Plaintiff, v. Citizens National Bank of Roswell, et al., Defendants. Supersedeas Bond. The within bond approved as to form, sufficiency and execution. (Signed) S. I. Roberts, Clerk.
Fifth Judicial District, Territory of New Mexico, County of
176 Chaves. Filed July 31, 1911, in my office. S. I. Roberts, Clerk, By —— ——, Deputy. Reid & Hervey, Roswell New Mex., Attorneys for Defendant Bank.

Be it further remembered that on the 2nd day of August, A. D. 1911, there was filed in the office of said Clerk, a Stipulation for Record in said cause, which said Stipulation for Record is in words and figures as follows, to-wit:—

In the Supreme Court of the Territory of New Mexico.

No. 1414.

GEORGE A. DAVISSON and ETTA OWENS, Appellees,
v.
THE CITIZENS NATIONAL BANK OF ROSWELL, Appellant.

Stipulation.

Whereas this cause was heretofore in the Supreme Court of the Territory of New Mexico, as George A. Davisson and Etta Owens, Appellant- vs. The Citizens National Bank, of Roswell, Appellee. being numbered 1332 in said court, and in said cause all the testimony that was introduced in the court below was *dull* made a part of the record therein and the entire record, duly and propertly certified as required by law, thereafter brought in said cause to the Supreme Court of said Territory, and

Whereas the said Supreme Court reversed said cause and remanded the same for new trial in the District Court of Chaves County, New Mexico, and;

Whereas the said cause was by stipulation again tried in the said

district court upon the record and evidence of the said former trial, from the judgment rendered upon the said last trial the Citi-
177 zens National Bank of Roswell has taken an appeal to the said Supreme Court, now:

Therefore, it is hereby stipulated and agreed by and between the parties hereto that the record that was filed in the Supreme Court in said cause 1332 therein, together with the record in this cause duly certified by the Clerk of the District Court of Chaves County to be all the record in said cause in said District Court made subsequent to the filing of the said mandate of said Supreme Court, in said District Court, is a full and complete record of the testimony, evidence, proceedings, findings of court and matters of record, and papers filed in said cause in the said District Court, and that the said Supreme Court may hear and determine this cause on such record as a complete record of this cause; provided, appellant shall obtain and file duplicate printed copies of the record in said cause No. 1332, as a part of its printed transcript on this appeal, and that a printed transcript of all proceedings had since the printing of such record shall be attached thereto to make the printed record for this appeal.

In witness whereof we have hereunto set our hands this 2nd day of August, 1911.

(Signed) THE CITIZENS NATIONAL BANK OF ROSWELL,
By W. C. REID & J. M. HERVEY,
Its Attorneys.
GEORGE A. DAVISSON,
By W. A. DUNN, *His Attorney.*
ETTA OWENS,
By ED. S. GIBBANY, *Her Attorney.*

Endorsement: No. 1414. District Court, Chaves County.
178 George A. Davisson v. Citizens National Bank. Stipulation for Record. Fifth Judicial District, Territory of New Mexico, County of Chaves. Filed August 2, 1911, in my office, S. I. Roberts, Clerk, by —— ——, Deputy.

Clerk's Certificate.

TERRITORY OF NEW MEXICO,
Fifth Judicial District, County of Chaves, ss:

I, S. I. Roberts, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, do hereby certify that the above and foregoing 41 pages contain a true and perfect transcript of the record and proceedings, as called for by the præcipe for Transcript on page One hereof, in cause numbered 1414 on the civil docket of said Court, wherein George A. Davisson was plaintiff and the Citizens National Bank of Roswell, et al., were defendants, as the same remain of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Roswell New Mexico, on this 3rd days August, A. D. 1911.

[SEAL.] S. I. ROBERTS,
Clerk of Said Court,
By GEO. L. WYLLYS, *Deputy.*

179 *Clerk's Certificate.*

TERRITORY OF NEW MEXICO,
Fifth Judicial District, County of Chaves, ss:

I, S. I. Roberts, Clerk of the District Court of the Fifth Judicial District of the Territory of New Mexico, within and for the County of Chaves, do hereby certify that the costs in cause numbered 1414 on the civil docket of said Court, wherein George A. Davisson is plaintiff and Citizens National Bank of Roswell, et al., are defendants, as shown by the docket in said cause and the Bill of the Clerk for Transcript therein are $16.35, of which amount the said Citizens National Bank of Roswell, defendant and appellant, has paid $18.75.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Roswell, New Mexico, on this 3rd day of August, A. D. 1911.

[SEAL.] S. I. ROBERTS,
Clerk of Said Court.
By GEO. L. WYLLYS, *Deputy.*

180 And afterwards, *on* to-wit, on the 18th day of September, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

GEORGE A. DAVISSON et al., Appellee,
v.
CITIZENS NATIONAL BANK, Appellant.

Assignment of Error.

The Citizens National Bank, by its attorneys, Reid and Hervey, assigns for error in this cause the following:

1. The Court erred in holding that the appellant Bank's liability in this action is not limited by the escrow agreement.

2. The Court erred in holding that the liability of the Bank is to be determined by the contract of Owens and Berryman, to which contract the bank was not a party, and the terms of which were not brought to its knowledge.

3. The Court erred in holding that the contract between Berryman and Owens did not become unenforceable under the statute of frauds.

4. The Court erred in holding that the complaint of Davisson stated facts sufficient to constitute a cause of action against the Citizens National Bank.

181 5. The Court erred in holding that the cross-complaint of Etta Owens stated facts sufficient to constitute a cause of action against the Appellant Citizens National Bank.

6. The Court erred in holding that the statement of the cause of action upon the contract, against one not a party to such complaint, constitutes a cause of action against one who is a party to such action, even though the latter was not a party to the contract upon which such complaint was based, nor an agent of either party in so far as the subject matter of such contract was concerned.

7. The Court erred in holding and assuming that the, "Supreme Court of the Territory in remanding the cause considered that the transaction with Berryman as pleaded constituted a cause of action against the Bank, because a sufficient cause of action against Berryman."

(Signed) REID & HERVEY,
Attorneys for Appellant, Citizens National Bank.

And afterwards, *on* to-wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1911, on the thirty-sixth day, the same being the 28th day of November, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

182 It is ordered by the Court that this cause be, and the same hereby is set for hearing for Tuesday December 5, A. D. 1911.

And afterwards, *on* to-wit, on the fortieth day of the said regular term, the same being Tuesday December 5, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

It is ordered by the Court that this cause be, and the same hereby is set for argument for 2 o'clock this afternoon.

And afterwards, *on* to-wit, on the fortieth day of the said regular term, the following amongst other proceedings were had and entered of record, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by W. E. Reid, Esq., for appellant, and submitted to the Court on briefs by appellee, and the Court not being sufficiently advised in the premises takes the same under advisement.

183 And afterwards, *on* to-wit, on the forty-sixth day of the said regular term, the same being Thursday December 21, A. D. 1911, the following amongst other proceedings were had anentered of record, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

This cause having been argued by counsel, submitted to and taken under advisement by the Court upon a former day of the present term, and the Court being now sufficiently advised in the premises, announces its decision by Associate Justice Roberts, Associate Justices McFie, Parker, Abbott, Mechem and Wright concurring, affirming the judgment of the Court below for reasons stated in the opinion of the Court on file.

It is therefore considered and adjudged by the Court that the judgment of the District Court in and for the County of Chaves whence this cause came into this Court be, and the same hereby is affirmed, and that in accordance therewith,

It is therefore considered and adjudged by the Court that the plaintiff, George A. Davisson, do have and recover from the defendant, Citizens National Bank of Roswell, New Mexico, a national banking corporation as principal and the United States Fidelity and Guaranty Company, a corporation, as surety on the appeal bond, the sum of Five Thousand eight hundred twenty-one and sixty-five one hundredths ($5,821.65) Dollars, together with interest thereon at the rate of Six (6%) Per Cent per annum from the 26th day of October, A. D. 1908, and his costs in this behalf expended to be taxed, for which let execution issue.

184 It is further considered and adjudged by the Court that the defendants, Etta Owens, James W. Owens and Adolph Andrews, as executors of the Estate of Solon B. Owens, deceased, do have and recover from the defendant, said Citizens National Bank of Roswell, as Principal and the United States Fidelity and Guaranty Company, a corporation, as surety on the appeal bond, the sum of Four Thousand eight hundred fifty-nine and sixteen one hundredths ($4,859.16) Dollars, with Six (6%) Per Cent interest per annum from the 26th day of October, 1908 until paid together with other costs in this behalf expended, for which let execution issue.

And afterwards, *on* to-wit, on the forty-sixth day of the said regular term, the same being December 21, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

Now comes W. E. Reid, attorney for appellants, and moves the Court to be granted an appeal from the judgment and decree of this Court to the Supreme Court of the United States, and the Court being sufficiently advised in the premises grants the same.

It is therefore considered and adjudged by the Court that the Appellant, Citizens National Bank of Roswell, and the United States Fidelity and Guaranty Company, its surety herein, do have and hereby are granted an appeal from the judgment and decree of this Court to the Supreme Court of the United States.

185 And afterwards, *on* to-wit, on the 21st day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on appeal to the United States Supreme Court in the above entitled cause, which said assignment of errors on appeal was, and is in the following words and figures, to-wit:

Supreme Court of the Territory of New Mexico.

No. 1425.

GEORGE A. DAVISSON and FAY ETTA OWENS, Appell
vs.
THE CITIZENS NATIONAL BANK OF ROSWELL, Appella

On Appeal from the Supreme Court of the Territory of New
to the Supreme Court of the United States.

Assignment of Errors.

Now comes the Appellant and respectfully submits that
record, proceedings, decision and final judgment of the S
Court of the Territory of New Mexico in the above entitled
there is manifest error in this, to-wit:

First. The Court erred in holding and deciding that the
of papers deposited with it in escrow could not redeliver th
deposited by one of the parties, to him, after the other party
escrow agreement was in default, in the performance of eve
he was bound to perform,—without the consent of such othe
in default, or order of Court.

186 Second. The Court erred in holding that the ap
Bank's liability in this action is not limited by the
agreement.

Third. The Court erred in holding that the liability
Bank is to be determined by the contract of Owens and Be
to which contract the bank was not a party, and the terms o
were not brought to its knowledge.

Fourth. The Court erred in holding that the contract
Berryman and Owens did not become unenforceable un
statute of frauds.

Fifth. The Court erred in holding that the complaint of I
stated facts sufficient to constitute a cause of action agai
Citizens National Bank.

Sixth. The Court erred in holding that the cross-comp
Etta Owens stated facts sufficient to constitute a cause of
against the Appellant Citizens National Bank.

Seventh. The Court erred in holding that the statement
cause of action upon the contract against one not a party
complaint, constitutes a cause of action against one who is a
such action, even though the latter was not a party to the
upon which such complaint was based, nor an agent of eith
in so far as the subject matter of such contract was concerne

Wherefore, Appellant prays that this cause may be rever
that judgment be entered in favor of Appellant, the defend
low, and such further relief as may be proper and just.

(Signed) WILLIAM C. REID
JAMES M. HERVE
Attorneys for Appellant, Roswell, New Me

187 And Afterwards, *on* to-wit, on the forty-seventh day of the said regular term, the same being Friday the 22nd day of December, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff; ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

This cause coming on before the Court upon the motion of appellants asking the Court to fix the amount of the Supersedeas bond therein upon appeal to the United States Supreme Court, and the Court being sufficiently advised in the premises, fixes the said Supersedeas bond at the sum of $22,000.00.

It is therefore considered and adjudged by the Court that the Supersedeas bond herein on appeal to the Supreme Court of the United States be, and the same is hereby fixed at the sum of $22,000.00.

And Afterwards, *on* to-wit, on the forty-seventh day of the said regular term, the same being Friday December 22, A. D. 1911, the following amongst other proceedings were had and entered of record as follows, to-wit:

No. 1425.

GEORGE A. DAVISSON, Plaintiff; ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

This cause coming on before the Court upon the motion of appellants for statement of facts in the nature of a special verdict on appeal to the United States Supreme Court, and the Court
188 being sufficiently advised in the premises makes the following findings of fact in the nature of a special verdict, to-wit:

The court finds the facts in this case to be as follows:

On August 21, 1908, one Etta Owens and one C. C. Berryman entered into a contract of sale and purchase of land in Chaves County, New Mexico. Appellee George Davisson was the agent of appellee Owens, and would be entitled to a commission for this services if the sale of the land should be finally consummated. This contract of sale was in writing, and the paper on which it was written was folded and placed in an envelope, together with a check executed by Berryman and payable to Mrs. Owens for the sum of $9,173.32. This envelope containing the contract and check, was

taken by appellees Owens and Davisson, and Berryman to the Citizens National Bank, to be held by the bank is escrow. The terms of the escrow were endorsed upon the envelop as follows:

' "Check enclosed to be held in escrow until September 10, when final settlement is to be made, deed and abstract to be placed in escrow with this Abstract to be forwarded to Citizens Band and Trust Company, Arkadelphia, Arkansas for examination. No money to be paid over until abstract is approved by purchaser's attorneys."
(Signed) J. J. JAFFA, *Cashier.*'

No officer of the bank ever read the contract of sale or knew of the terms thereof, but the terms of the escrow were agreed to by all the parties. It was not the intention of the parties that the check for $9,173.32 was to be an absolute payment on the purchase price of the land, but it was to remain in escrow until September 10, 1908,
pending the furnishing of an abstract of title and a favorable
189 report thereon, and the final settlement. The contract itself was never delivered to either of the parties, other than being placed in escrow. The appellee Owens, so far as the bank knew, never performed the agreements contained in the escrow, that is, Mrs. Owens did not deliver a deed or an abstract of title to the land to the bank or to Berryman by September 10th, and the title of the land was never approved so far as the bank knew.

On September 10, or subsequent thereto, Berryman and Owens made a verbal agreement to extend the time in which to perfect the title to the land, but the bank had no knowledge of this extension of time at the time it was made, and it never had any knowledge of the new parol contract, other than Owens, by her agent, stated there was such a contract, but Berryman denied this. Berryman would not and did not give his consent to the bank to vary or extend the terms of the escrow agreement, and would not and did not give his consent that the bank might extend the time for the performance of the various acts mentioned in the escrow agreement by Mrs. Owens.

After September 10th, and after the time had passed within which Mrs. Owens was to have placed an abstract of title and deed in the bank, but was in default, Berryman demanded the return of his check, the equivalent of which was returned to him by the bank. Mrs. Owens then gave an order to Davisson upon the bank for his commission, and both Davisson and Mrs. Owens demanded their respective alleged shares of the $9,173.32 of the bank, and this suit was brought by them to recover the respective amounts alleged to be due them from the bank for its alleged wrongful return of the check or its equivalent to Berryman. Berryman was not made a party to the suit.

(Signed) WILLIAM H. POPE,
Chief Justice.

190 And Afterwards, *on* to-wit, on the 2nd day of January, A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a Supersedeas Bond in the above entitled cause, which said supersedeas bond was, and is in the following words and figures, to-wit:

Know all men by these presents: That we, the Citizens National Bank of Roswell, New Mexico, a corporation organized under the National Banking Laws, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation authorized to transact business in the Territory of New Mexico, as principals, and The Title Guaranty & Surety Company as sureties, are held and firmly bound unto George A. Davisson and Fayetta Owens in the penal sum of Twenty-two thousand dollars ($22,000) to the payment whereof, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents;

The conditions of the foregoing obligation is such that:

Whereas, On the 22nd day of July, 1911, the above named George A. Davisson and Fayetta Owens recovered judgment in the District Court of Chaves County, New Mexico, against the said The Citizens National Bank of Roswell, New Mexico, in the sum of Ten Thousand Six Hundred and Eighty and 81/100 Dollars ($10680.81), together with interest and costs of suit, and:

Whereas, the said judgment was taken on appeal to the Supreme Court of the Territory of New Mexico, and the United States
191 Fidelity and Guaranty Company became a surety on the supersedeas bond of the said Citizens National Bank, and;

Whereas, on the 21st day of December, A. D. 1911, the said judgment of the said District Court was by the Supreme Court of the Territory of New Mexico affirmed, and final judgment was rendered in the said Supreme Court against the said The Citizens National Bank, as principal, and the United States Fidelity and Guaranty Company, as surety on its appeal and supersedeas bond, in the sum of Ten Thousand-Six Hundred and Eighty and 81/100 Dollars ($10680.81), together with interest and costs in favor of the said George A. Davis-on and Fayetta Owens, and;

Whereas, the above bounden Citizens National Bank of Roswell, New Mexico and the United States Fidelity and Guaranty Company of Baltimore, Maryland have taken an appeal from said final judgment of the said Supreme Court of the Territory of New Mexico to the Supreme Court of the United States, and have been required to give supersedeas bond upon such appeal in the penal sum of Twenty-two Thousand Dollars ($22,000.00):

Now, therefore, if the said The Citizens National Bank of Roswell, New Mexico, and the United States Fidelity and Guaranty Company of Baltimore, Maryland shall prosecute their said appeal to effect and answer all damages and costs, if said appeal be dismissed or said judgment of the Supreme Court of the Territory of New Mexico be affirmed, then, the above obligation to be void, otherwise to remain in full force and effect.

In witness whereof, the corporations acting as principal and sureties herein, have hereunto set their hands and seals by the au-
192 thority of their respective Boards of Directors, this 28th day of December, 1911,

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO,
By JNO. W. POE, *Its President.*

[Corporate Seal.]

Attest:
J. J. JAFFA, *Cashier.*

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By B. H. McCUNE AND E. G. MINTON,
Its Attorneys in Fact.
THE TITLE GUARANTY & SURETY COMPANY,
[SEAL.] By JOSE D. SENA, *Its Attorney in Fact.*

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 28th day of December, 1911, before me personally appeared John W. Poe, to me personally known, and being by me duly sworn did say: That he is the President of The Citizens National Bank of Roswell, New Mexico, a corporation; that the seal affixed to the foregoing bond is the corporate seal of said corporation; that said bond was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said John W. Poe acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and
193 affixed my official seal on the day and year in this certificate first above written.

[SEAL.] OLIVER H. SMITH,
Notary Public, Chaves County.

My commission expires the 28th day of January, 1913.

TERRITORY OF NEW MEXICO,
County of Chaves, ss:

On this 28th day of December, 1911, before me personally appeared R. H. McCune, and E. G. Minton, to me known to be the attorneys in fact of the United States Fidelity and Guaranty Company of Baltimore, Maryland, corporation described in and who executed the foregoing instrument as principal, and they acknowledged that they executed the same as the free act and deed of the said United States Fidelity and Guaranty Company, and that the seal affixed to said bond was the corporate seal of said corporation; that it was thereto affixed by order of the Board of Directors of said Company, and that they signed their names thereto by like order and authority as the attorneys in fact of said company.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

S. I. ROBERTS,
Clerk Dist. Court, 5th Jud. Dist., Chaves County, N. M.,
By GEO. L. WYLLYS, *D'p'ty.*

194 TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this 9nd day of Jan. 1912, before me personally appeared Jose D. Sena to me personally known to be the attorneys in fact of the Title Guaranty and Surety Company of Scranton, Pennsylvania, the corporation described in and which executed the foregoing bond of the Citizens Bank of Roswell, New Mexico and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety thereon, and they acknowledged that they executed the same as the free act and deed of the said Title Guaranty and Surety Company, and that the seal affixed to said bond is the corporate seal of said company, and is thereto affixed by order and authority of the Board of Directors of said Company, and that they signed their names thereon by like order and authority, as attorneys in fact of said company.

In witness whereof, I have hereunto set my hand and affixed my official — on the day and year in this certificate first above written.

[SEAL.] ANITA J. CHAPMAN,
Notary Public, Santa Fe County.

My commission expires the 26th day of August 1915.

The above and foregoing bond is hereby approved both as to form and sufficiency of sureties thereon.

(Signed) JOHN R. McFIE,
Associate Justice.

195 And Afterwards, *on* to-wit, on the 30th day of August, A. D. 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the Court in the above entitled cause when the said cause was up for hearing before this Court at a previous term, the said cause being numbered 1332, which said opinion of the Court was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1910.

No. 1332.

GEORGE A. DAVISSON, Plaintiff, Appellant,
v.
CITIZENS NATIONAL BANK OF ROSWELL, Defendant, Appellee, and ETTA OWENS, Defendant, Appellant.

Appeal from the District Court of Chaves County. Reversed.

W. A. Dunn, Attorney for Appellant George A. Davisson.
W. C. Reid, and R. E. Lund, Attorneys for appellee, Citizens National Bank.
Ed. S. Gibbany, Attorney for Appellants, Etta Owens, et al.

Syllabus.

1. Under the circumstances set out in the statement of facts, the appellee as holder of an escrow was not justified in delivering it to either party.

Statement of Facts.

The appellant Owens and one Berryman entered into a
196 contract for the sale of lands, the appellant Davisson acting as agent for Owens. The conditions of the contract are not material here. After signing up the contract, Berryman drew his check upon an Arkansas bank in favor of Davisson, as agent, for $9,173.32, the check was placed in an envelope with the contract of sale and the parties in company went to the appellee bank and delivered the envelope containing the check and contract to the cashier of the bank, who, as the court found, in the presence and with the concurrence of all the parties, made the following written endorsement on the envelope:—

"Check enclosed to be held in escrow until September 10th, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens Bank and Trust Company, Arkadelphia, Ark. for examination. No money to be paid over until abstract is approved." (Signed) J. J. Jaffa, Cashier."

Berryman thereafter made demand upon the bank for the return of the money, the check in the meantime having been cashed and the money in the hands of the bank. The bank called upon the appellants for their consent, which, for various reasons, they refused to give, but the bank delivered the money to Berryman. Suit was brought by Davisson against the bank to recover his commission on the sale. Mrs. Owens and her co-executors of the estate of Solon M. Owens, deceased, were made parties defendants. They answered and filed a cross-complaint against the bank and asked judgment for the money. The case was tried by the court without a jury. Judgment for the appellee and appellants bring this appeal.

Opinion of the Court.

MECHEM, *J.:*

The Court below held that the bank's liability was fixed and limited by the memorandum above mentioned, and that as no abstract "approved by purchaser's attorney" was presented to
197 the bank on or prior to September 10th, that after said date "it became the duty of the bank to deliver said check or its proceeds to C. C. Berryman, one of the parties to the escrow agreement upon demand."

Now, it is admitted that the bank was acting as agent for both parties as far as the escrow itself was concerned, and the question is, did the bank act as it should have acted, or did it fail in its duty to either party?

Admitting the correctness of this holding for the sake of argu-

ment, the question then is, did the bank fulfill its duty to the appellants as fixed by the memorandum? To this question we think the reply should be in the negative, for the reason that nowhere in the memorandum was the bank authorized to make any delivery of any paper, money or anything.

Had the appellants both agreed that Mr. Berryman should have his money or check back, then the bank would have been relieved from any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken sides, and when it failed to secure appellants' consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance.

However, it took sides in this matter and will be held as it should be, to have acted at its peril and to be responsible to appellants for the fund if they can show a right to the same under the contract made with Berryman, either in its original form or as amended by the parties to it.

The law governing the duties of the bank in this case is well stated by Page in his work on Contracts:—

"The depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor
198 save upon the fulfillment of the agreed conditions deliver it to the latter without the former's consent." 2 Page Contracts, 585.

There happened no condition, as set forth in the memorandum, upon the fulfillment of which, or failure to fulfill the bank was directed to return the papers to either party.

We do not deem it necessary upon this appeal to decide any of the other questions raised by the brief of appellants, except that the appellees will be held to be responsible to the appellant- if they, upon a re-trial of this cause, shall sustain a right to the money the bank had belonging to Berryman and paid over to him in violation of its duty to appellants.

The judgment of the lower court is reversed and remanded with instructions to reinstate the cause and proceed in accordance with the views expressed in this opinion.

MERRITT C. MECHEM, *A. J.*

We Concur:

JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*
EDWARD R. WRIGHT, *A. J.*

Pope, C. J., having heard this cause below did not participate in this opinion.

And Heretofore, *on* to-wit, on the 21st day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the Court in the above

entitled cause, which said opinion of the Court was, and is in the following words and figures, to-wit:

199 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1425.

GEORGE A. DAVISSON, Plaintiff; ETTA OWENS, Defendant, Appellees,
vs.
CITIZENS NATIONAL BANK, Defendant, Appellant.

Appeal from District Court, Chaves County.

Statement of Facts.

This cause of action was before this court upon practically the same record and upon the former hearing the case was reversed with instructions to the lower court to reinstate the cause and proceed in accordance with the views therein expressed. (*L*13 Pac. 598). Upon the second trial of the cause in the court below no new pleadings or amendments to the pleadings were made and no additional evidence was introduced. The court below, in accordance with the mandate of this court, made findings of fact and conclusions of law and entered judgment for the appellees, from which judgment this appeal is prosecuted.

Opinion of the Court.

ROBERTS, *J.*:

Upon this second appeal we are limited to a consideration of but one question, viz., did the lower court reach its final decree in due pursuance of the previous opinion and mandate of this Court? We find that it did.

Appellant has presented, as a new proposition in this case, the point that neither the complaint of Davisson nor the cross-complaint of Mrs. Owens states facts sufficient to constitute a cause of action against the appellant Bank, but we are precluded from a consideration of this proposition on this appeal. This question could have been raised upon the former appeal. It is the settled law in New Mexico, as well as in the Supreme Court of the United
200 States, that a decision in a prior appeal is the law of the case and that upon a subsequent appeal nothing is before the court for revision but the proceedings subsequent to the mandate. (United States v. Camou, 184 U. S. 572; Barnett v. Barnett, 9 N. M. 205; Crary v. Field, 10 N. M. 257.) This doctrine appears also to be supported by practically all of the states of the Union, with the possible exception of Missouri, Indiana and Nebraska. A very instructive note on this proposition is found in the Nebraska case of Hastings v. Foxworthy in 34 L. R. A. 321.

The former decision of this case being the law of the case, whether

right or wrong, this court is bound to adhere to it so far as this case is concerned and the cause will therefore be affirmed.

CLARENCE J. ROBERTS,
Associate Justice.

We Concur:
JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*
MERRITT C. MECHEM, *A. J.*
E. R. WRIGHT, *A. J.*

Pope, C. J., having tried the case below did not participate.

201 STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the above and foregoing two hundred (200) pages contain a full true and complete transcript of the record and proceedings, pleadings and opinion in the above entitled cause, which hereby is transmitted to the Supreme Court of the United States in accordance with an appeal heretofore granted herein.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 11th day of January A. D. 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court, State of New Mexico.

202 United States of America to Geor-e A. Davis-on, Plaintiff; Etta Owens, Defendant, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an appeal taken from the Supreme Court of the Territory of New Mexico, wherein The Citizens National Bank were appellants and you were appellees, to show cause, if any there be, why the judgment rendered against the said appellant as — the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January, A. D. 1912.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,
Chief Justice Supreme Court of New Mexico.

Service of the foregoing citation acknowledged on this 5th day of January, 1912.

W. A. DUNN,
Att'y for Geo. A. Davisson.
ED. S. GIBBANY,
Att'y for Fayetta Owens and the Estate of S. B. Owens, Dec'd.

Endorsed on cover: File No. 23,060. New Mexico Territory Supreme Court. Term No. 984. The Citizens National Bank of Roswell, New Mexico, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, appellants, vs. George A. Davisson and Fayetta Owens. Filed February 15th, 1912. File No. 23,060.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 551

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL., Appellants,

vs.

GEORGE A. DAVISSON and FAY ETTA OWENS, Appellees.

BRIEF OF APPELLANTS

WILLIAM C. REID,
JAMES M. HERVEY,
Attorneys for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 551

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL., Appellants,

vs.

GEORGE A. DAVISSON and FAY ETTA OWENS, Appellees.

BRIEF OF APPELLANTS

WILLIAM G. REID,
JAMES M. HERVEY,
Attorneys for Appellants.

STATEMENT OF THE CASE.

On August 21, 1908, one Etta Owens and one C. C. Berryman entered into a contract of sale and purchase of land in Chaves County, New Mexico. Appellee George Davisson was the agent of Appellee Owens, and would be entitled to a commission for his service if the sale of the land should be finally consummated. This contract of sale was in writing; and the paper on which it was written was folded and placed in an envelope, together with a check executed by Berryman and payable to Mrs. Owens for the sum of $9,173.32. This envelope containing the contract and check, was taken by Owens and Davisson, and Berryman to the Citizens National Bank, to be held by the bank in escrow. The terms of the escrow were endorsed upon the envelop as follows:

"Check enclosed to be held in escrow until September 10, when final settlement is to be made, deed and abstract to be placed in escrow with this. Abstract to be forwarded to Citizens' Bank & Trust Company, Arkadelphia, Arkansas, for examination. No money to be paid over until abstract is approved by purchaser's attorneys."

(Signed) J. J. JAFFA,
Cashier.

No officer of the Bank ever read the contract of sale or knew of the terms thereof, but the terms of the escrow, as above set forth, were agreed to by all the parties. It was not the intention of the parties that the check for $9,173.32 was to be an absolute payment on the purchase price of the land, but it was to remain in escrow until September 10, 1908, pending the furnishing of an abstract of title and a favorable report thereon, and the final settlement. The contract itself was never delivered to either of the parties, other than being placed in escrow. The Appellee Owens, so far as the bank knew, never performed the agreements contained in the escrow, that is, Mrs. Owens did not deliver a deed or an abstract of title to the land to the bank or to Berryman by September 10th, and the title of the land was never approved so far as the bank knew.

After September 10th, and after the time had passed within which Mrs. Owens was to have placed an abstract of title and deed in the bank, but was in default. Berryman demanded the return of his check, the equivalent of which was returned to him by the bank. Mrs. Owens then gave an order to Davisson upon the bank for his commission, and both Davisson and Mrs. Owens demanded their respective alleged shares of the $9,173.32 of the bank, and this suit was brought by them to recover the respective amounts alleged to be due them from the bank for its alleged wrongful return of the check or its equivalent to Berry-

man. Berryman was not made a party to the suit. (Tr. 123.)

The District Court in which this case was tried held that the Bank was held by the terms of the escrow agreement, which were written on the back of the envelope and that "the Bank was therefore not only *not* in default in its duty in returning this check to Berryman, but was proceeding in strict accordance with the terms of its escrow in so doing" (tr. p. 93) and judgment was accordingly rendered in favor of the Bank. From this judgment Owens and Davisson appealed to the Supreme Court of the Territory of New Mexico, which court reversed the judgment of the District Court for the reason that nowhere in the memorandum (escrow) was the Bank authorized to make any delivery of any paper, money or anything" * * * and it should not have taken side, and when it failed to secure appellants' (Owens and Davisson) consent it should have held the escrow and let the parties either come to some agreement among themselves, or appeal to the courts" (tr. 105). The cause was remanded with instructions to reinstate and proceed in accordance with the views expressed in the opinion of the Territorial Supreme Court. The case was by stipulation, (tr. 102) again tried on the pleading and evidence of the first trial and the District Court held that the Supreme Court had declared that "the Bank is responsible to Davisson and Owens if these can show a right to the fund under the contract with Berryman either in its

original form or as amended by the parties to it," and the District Court, "bowing to this as the law of the case" rendered judgment against the Bank. The Bank then appealed to the Supreme Court of the Territory, which held that the District Court had reached its finad decree in due pursuance of the previous opinion of the Supreme Court of the Territory and the former decision of the case being the law of the case whether right or wrong, it bound that court, and the judgment of the District Court was affirmed. (tr. p. 130). From this final judgment the case is in the Supreme Court of the United States on appeal. (end of page).

SPECIFICATION OF THE ERRORS RELIED UPON.

First. The Court erred in holding and deciding that the holder of papers deposited with it in escrow could not redeliver the paper deposited by one of the parties, to him, after the other party to the escrow agreement was in default, in the performance of everything he was bound to perform,—without the consent of such other party in default, or order of Court.

Second. That Court erred in holding that the Appellant Bank's liability in this action is not limited by the escrow agreement.

Third. The Court erred in holding that the liability of the Bank is to be determined by the contract of Owens and Berryman, to which contract the Bank was not a party, and the terms of

which were not brought to its knowledge.

Fourth. The Court erred in holding that the contract between Berryman and Owens did not become unenforcable under the statute of frauds.

Fifth. The Court erred in holding that the complaint of Davisson stated facts sufficient to constitute a case of action against the Citizens' National Bank.

Sixth. The Court erred in holding that the cross-complaint of Etta Owens stated facts sufficient to constitute a cause of action against the Appellant Citizens' National Bank.

Seventh. The Court erred in holding that the statement of the cause of action upon the contract against one not a party to such complaint, constitutes a cause of action against one who is a party to such action, even though the latter was not a party to the contract upon which such complaint was based, nor an agent of either party insofar as the subject matter of such contract was concerned.

The decree is erroneous in that it makes the Bank, which was the holder of an escrow, liable in conversion for money held in escrow and which it redelivered to one of the parties to the escrow agreement, who was not in default, after the other party to the escrow agreement was wholly in default in the performance of the conditions of the escrow agreement, and basing this liability on two grounds, First, that there was no express authority in the escrow agreement for the redelivery and;

Second, the parties to the escrow agreement had later made another agreement to which the Bank was not a party and had no knowledge and which, alleged, later agreement was denied by the party who deposited the money in escrow and was then demanding the redelivery of it on grounds of default of the other party to the agreement. The effect of this being, as the trial court states, (tr. 109) that the later "transaction with Berryman as pleaded constituted a cause of action against the Bank, because a sufficient cause of action against Berryman."

BRIEF AND ARGUMENT.

First Point.

Treating the First Assignment of Error.

First. The Court erred in holding and deciding that the holder of papers deposited with it in escrow could not redeliver the paper deposited by one of the parties, to him, after the other party to the escrow agreement was in default, in the performance of everything he was bound to perform, —without the consent of such other party in default, or order of Court.

This case is practically before this Court on the errors alleged to have been committed by the Supreme Court of New Mexico on the first appeal. The second trial and the second appeal were necessary in order to obtain a final judgment from which an appeal to this court might be taken. In such cases, the Court will consider the errors committed on the first appeal.

United States v. Denver & Rio Grande Railway Company, 191 U. S. 84;

Zeckendorf v. Steinfeild, 32 Sup. Ct. Rep. 728.

The following is the escrow agreement:

"Check enclosed to be held in escrow until September 10th, when final settlement is to be made, Deed and Abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens' Bank and Trust Company, Arkadelphia,

Ark., for examination. No money to be paid until abstract is approved."

(Signed) J. J. JAFFA,
Cashier.

Assuming that the liability of the Bank is to be tested by the terms of the escrow agreement, did the Bank become liable in conversion for a redelivery to Berryman of his money after the other party, Owens, had defaulted in placing the deed and abstract of title with the Bank within the agreed time? The Supreme Court of the Territory of New Mexico answered this in the affirmative, because; "nowhere in the memorandum was the Bank authorized to make delivery of any paper, money, or anything." Was such authorization necessary? The Territorial Court said that the Bank should have either let the parties come to some agreement or go into Court, but the parties would not agree, and if there be no rule of law to decide such matters, what could be accomplished by going to court? We submit that there *is* a rule of law governing the action of the holder of an escrow such as this, and it is *not* the rule cited by the Ter- law governing th eaction of the holder of an escrow ritorial Supreme Court. That Court based its opinion upon the authority of Section 585 of Vol. II of Page on Contracts. An examination of this section shows the facts in the case at bar do not warrant the adoption of the rule of law set forth in Page on Contracts (*supra*).

We call the Court's attention to the fact that

in the chapter in Page on Contracts where this statement is found the author was not treating of the duty of a holder of an escrow, but was treating the subject of the delivery of contracts. The quotation which the court makes from Page is in turn a quotation from the opinion in the case of Davis vs. Clark, 58 Kansas, 100; 48 Pac., 565, and that court in turn makes this statement on the authority of two former Kansas cases, to-wit: Roberts vs. Mullenix, 10 Kansas 22, and Grove vs. Jennings, 46 Kansas, 366; 26 Pac., 738, and in commenting on the case of Roberts vs. Mullenix *supra* the court in Davis vs. Clark, *supra*, says: "In the case of Roberts vs. Mullenix, *supra*, the delivery was made to the grantee without the knowledge of the grantor and without the fulfillment of the conditions; "and in the case of Groves vs. Jennings, *supra*, redelivery to the grantor was made without the authority of the grantee, *and without default in the performance of the conditions upon his part.* (italics are ours). No authority is cited by the appellee and we are confident cannot be cited to sustain the proposition that the holder of an escrow can not return the papers to one party to the escrow agreement after default of the other party in meeting the conditions of the escrow agreement.

We believe the law relative to the duty of the holder of an escrow, where the time limit therein has expired leaving conditions unperformed, is correctly set forth in the authorities of—

16 Cyc., 576, 584.

11 Am. & Eng. Enc. of Law, page 352.

Humphrey vs. Richmond, etc., R. R. Co., 13 S. E. 985.

Burlington R. R. Co. v. Palmer, 42 Iowa, 222.

Bodwell vs. Webster, 13 Pick., 411.

Hayton vs. Meeks (Ark.) 14 S. W., 864.

Equity Gaslight Co. vs. McKeige (N. Y.) 34 N. E. 898.

Riggs vs. Trees (Ind.), 5 L. R. A., 696.

Hoyt vs. McLagan, 87 Ia., 146.

SECOND POINT.

Treating the Second and Third Assignments of Error.

Second. The court erred in holding that the Appellant Bank's liability in this action is not limited by the escrow agreement.

Third. The Court erred in holding that the liability of the Bank is to be determined by the contract of Owens and Berryman, to which contract the Bank was not a party, and the terms of which were not brought to its knowledge.

The facts show that the officers of the Bank had no knowledge of the contents of the contract of sale deposited in the envelope on which envelope the escrow agreement was written. This latter

was the only contract or agreement to which the Bank was a party, and certainly one cannot be bound by a contract to which he is not a party or privy, and of which he has no knowledge. It would also require the consent of all the parties to the escrow agreement to change in the slightest degree the duties or liabilities of any one of the parties thereto. It is contended that two of the parties to that agreement did make a new agreement, but the Bank was not a party thereto, and while one of the parties to this alleged new agreement declared to the Bank officials that it had been made, the other party denied that it had been made, and *a fortiori*, would *not* consent to the changing of the duties of the Bank from what they were under the escrow agreement.

THIRD POINT.

Treating of the Fourth Assignment of Error.

Fourth. The Court erred in holding that the contract between Berryman and Owens did not become unenforcable under the statute of frauds.

The District Court, at the second trial, assuming that it was directed by the Supreme Court of New Mexico to find that, if a case was made against Berryman, who was not a party to the suit, judgment should therefore be rendered against the Bank, found, that the original contract of sale which was placed in the Bank was superceded by a parol contract which was not, so far at least as

the Bank knew, assented to by Berryman. This parol contract was denied in the answer of the Bank and the statute of frauds pleaded. Appellee's counsel, below, urged that the defense of that statute frauds was personal and therefore not available to the Bank. This contention on the part of counsel put them in the anomalous position of contending in one breath that the Bank is a stranger to the parol contract and in the next breath that it should be bound by it, although it is not in evidence that it in any manner assumed any responsibility under this alleged parol contract but to the contrary the Bank being without authority to extend the time as set in the escrow agreement except with the consent of Berryman (and the court below found that Berryman had never given such consent).

We are of the opinion that the Bank was a stranger to the alleged parol contract, but if, as assumed by the Court, it is bound by it, it could only be so bound as a privy of Berryman and the statute of frauds is available by parties to the contract, their representatives and privies.

29 Am. and Eng. Enc. of Law, p 807.

It would, indeed, be a peculiar rule of law that would bind the Bank because Berryman was bound and not give to it the defense that Berryman might make.

The contract in question being for the sale of land, is within the statute of frauds, and the District Court on the second trial, having found "that

at or about that date (September 10th, 1908), a further conference was held in which it was orally agreed between Berryman and the Estate that the latter should have thirty or forty days in which to secure an order of the Court," this was a subsequent variation of the contract in writing by parol which is not permissible.

Emerson v. Slater, 22 Howard, 42;
Swain v. Seeman, 9 Wallace, 254-274.

The effect of changing the time for performance of a written contract that was in escrow with the Bank would be to make the entire contract a parol contract.

Kirchner v. Laughlin, 4 N. M. 394;
Hasbrouck v. Tappen, 15 Johnson 200;
Hersley v. Saranstrom, 41 N. W. 1027;
Athe v. Bartholomew, 33 N. W. 110;
Abel v. Munson, 18 Mich., 305;
Cook v. Bell, 18 Mich., 389;
29 Am. and Eng. Enc. of Law, 824-25.

According to the testimony of the plaintiff and the Defendant Owen, and the finding of the Court below, Berryman moved on the land to save expenses, and not as taking possession of the place as the owner thereof because it would not be supposed that this act would bind him to take the land at all events. This act would certainly not bind him to take the land should the Court refuse to give permission to sell the same.

In addition to this, it is a general rule of law

with an exception only where the statute so provides, that part performance of a contract within the statute of frauds does not remove it from the operation of such statute, 20 Cyc., 289. And it is held as applying to taking possession of land, and that oral promises to convey land gain no validity at law by reason of the taking possession of land by the proposed purchaser.

20 Cyc., 296, and cases cited thereunder.

Berryman under his contract, was entitled to a deed from Mrs. Owens, personally, that is, she agreed in the contract "to convey to the party of the second part, by deed with *covenants of general warranty*" said land, and Berryman was entitled to a deed of that sort from her. It is contended that a new parol agreement provided for a deed from the "estate." The contention of the parties and the findings and conclusions of the Court is in conflict with the statute of frauds, under the authorities above cited.

"It is generally held that unless the contract expressly provides that a deed shall be made by a third person, it must be made by the vendor himself, even though the words of the contract are that the vendor shall execute the deed or cause it to be executed."

29 Am. & Eng. Enc. of Law, 701.

Warrelle on Vendors, Sec. 419.

FOURTH POINT.

Treating of the Fifth and Sixth Assignments of Error.

Fifth. The Court erred in holding that the complaint of Davisson stated facts sufficient to constitute a cause of action against the Citizens' National Bank.

Sixth. The Court erred in holding that the cross-complaint of Etta Owens stated facts sufficient to constitute a cause of action against the Appellant Citizens' National Bank.

In both the complaint and the cross-complaint it is alleged that the check was deposited by *agreement of the parties* with the Citizens' National Bank. There is no statement as to what the agreement was, but if the check was deposited by agreement between the parties, then, before the money could be drawn out by either party or the Bank become liable for failure to pay on the order of one of the parties, the agreement under which the money was placed in the Bank must be compiled with or the time limit in which one of the parties was to perform some act must have expired, and this brought to the Bank's attention. There is no allegation of such further agreement as this, and therefore neither the complaint nor the cross-complaint states a cause of action against the Bank.

"The objection that a complaint does not state facts sufficient to constitute a cause of action, is

never waived, but is available at any stage of the proceedings."

Enc. of Pl. & Pr. Vol.. 6, p. 373.

FIFTH POINT.

Treating of the Seventh Assignment of Error.

Seventh. The Court erred in holding that the statement of the cause of action upon the contract against one not a party to such complaint, constitutes a cause of action against one who is a party to such action, even though the latter was not a party to the contract upon which such complaint was based, nor an agent of either party in so far as the subject matter of such contract was concerned.

The District Court in the opinion rendered on the second trial of this case construed the opinion of the Territorial Supreme Court to announce the doctrine, that "the transaction with Berryman as pleaded constituted a cause of action against the Bank, because a sufficient cause of action against Berryman." This was affirmed on the second appeal. Keeping in view the finding of the Court that the Bank knew nothing of the transaction Owen had with Berryman, other than the terms of the escrow written on the back of the envelope, we have the proposition announced by the Territorial Supreme Court, and followed in the District Court, that statements in a complaint sufficient to constitute a cause of action against one who *is not*

a party to the cause of action are sufficient to constitute a cause of action against one who *is* a party. A statement of the proposition is a sufficient answer thereto.

The position heretofore taken by counsel for Appellees is, that the rule "responsible over" or "remedy over" applies in this case. To have "remedy over," a case of action must be stated against a party to the suit, and then if he is liable and judgment be entered against him, the party who is responsible to him and who might have defended and did not, is bound by the judgment . But counsel for appellees must necessarily reverse this rule in order to make it applicable to the case at bar, for in the case at bar it is attempted to state a cause of action against one not named in the complaint, and bind the defendant who is named in the complaint by such statement, a position that is contrary to every principle of pleading. The rule "responsible over" can be applied only where the party against whom suit is brought is primarily liable.

Robbins v. Chicago City, 4 Wall., 657.

Respectfully submitted,

WILLIAM C. REID,

JAMES M. HERVEY,

Attorneys for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 551.

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL., APPELLANTS,

vs.

GEORGE A. DAVISSON AND FAY ETTA OWENS, APPELLEES.

BRIEF OF APPELLANTS ON APPELLEES' MOTION TO AFFIRM.

WILLIAM C. REID,
JAMES M. HERVEY,
Attorneys for Appellants.

(23,060)

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THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL., APPELLANTS,

vs.

GEORGE A. DAVISSON AND FAY ETTA OWENS, APPELLEES.

BRIEF OF APPELLANTS ON APPELLEES' MOTION TO AFFIRM.

Appellees have filed a motion to affirm the judgment of the Supreme Court of the Territory of New Mexico, on the grounds that this appeal is taken for delay only, and that the questions upon which the decision of the case depends are frivolous. It is assumed that the appellees make this statement upon the ground that the opinion of the Supreme Court of New Mexico on the first hearing of the case is the law of the case in the Supreme Court of the United States, as is gathered

from the heading used on page 3 of the brief of appellees on this motion. It is sufficient answer to this contention to cite the case of United States *vs.* Denver and Rio Grande Railway Company, 191 U. S., 84, and the opinion of this court in the recent case of Zeckendorf *vs.* Steinfeld, 32 Supreme Court Reporter, page 728, decided at the 1911 term of court. In each of these cases it was held by this court that the holding of the Territorial Supreme Court on the first appeal was not the law of the case for the United States Supreme Court on a review of the decree rendered on the second appeal.

Appellees in their brief on this motion refer to the findings of fact by the District Court, setting out the same quite fully, and setting out in full the opinion of the Supreme Court of the Territory of New Mexico on the first appeal. Neither the findings of the District Court nor the opinion of the Territorial Supreme Court, on the first appeal, in any way conclude this court in the consideration of this case.

The facts in this case, which must alone be the basis of the judgment of the Supreme Court of the United States, are those findings sent up to this court by the Supreme Court of the Territory of New Mexico.

Eagle Mining and Imp. Co. *vs.* Hamilton, 218 U. S., 513.

Zeckendorf *vs.* Steinfeld, 32 S. Ct. Rpt., 728.

The findings of fact are as follows:

"This cause coming on before the court upon the motion of appellants for statement of facts in the nature of a special verdict on appeal to the United States Supreme Court, and the court being sufficiently advised in the premises makes the following findings of fact in the nature of a special verdict, to-wit:

"The court finds the facts in this case to be as follows:

"On August 21st, 1908, one Etta Owens and one C. C. Berryman entered into a contract of sale and purchase of land in Chaves county, New Mexico. Appellee George Davisson was the agent of Appellee Owens, and would be entitled to a commission for his service if the sale of the land should be finally consummated. This contract of sale was in writing, and the paper on which it was written was folded and placed in an envelope, together with a check executed by Berryman and payable to Mrs. Owens for the sum of $9,173.32. This envelope containing the contract and check, was taken by Appellees Owens and Davisson, and Berryman to the Citizens National Bank, to be held by the bank in escrow. The terms of the escrow were endorsed upon the envelope as follows:

" 'Check enclosed to be held in escrow until September 10, when final settlement is to be made, deed and abstract to be placed in escrow with this abstract to be forwarded to Citizens Bank and Trust Company, Arkadelphia, Arkansas, for examination. No money to be paid over until abstract is approved by purchaser's attorneys.

(Signed) 'J. J. JAFFA, *Cashier.*'

"No officer of the bank ever read the contract of sale or knew of the terms thereof, but the terms of the escrow were agreed to by all the parties. It was not the intention of the parties that the check for $9,173.32 was to be an absolute payment on the purchase price of the land, but it was to remain in escrow until September 10, 1908, pending the furnishing of an abstract of title and a favorable report thereon, and the final settlement. The contract itself was never delivered to either of the parties, other than being placed in escrow. The appellee Owens, so far as the bank knew, never performed the agreements contained in the escrow, that is, Mrs. Owens did not deliver a deed or an abstract of title to the land, to the bank or to Berryman by September 10th, and the title of the land was never approved so far as the bank knew.

"On September 10, or subsequent thereto, Berryman and Owens made a verbal agreement to extend the time in which to perfect title to the land, but the bank had no knowledge of this extension of time at the time it was made, and it never had any knowledge of the new parol contract, other than Owens, by her agent, stated there was such a contract, but Berryman denied this. Berryman would not and did not give his consent to the bank to vary or extend the terms of the escrow agreement, and would not and did not give his consent that the bank might extend the time for the performance of the various acts mentioned in the escrow agreement by Mrs. Owens.

"After September 10th, and after the time had passed within which Mrs. Owens

was to have placed an abstract of title and deed in the bank, but was in default, Berryman demanded the return of his check, the equivalent of which was returned to him by the bank. Mrs. Owens then gave an order to Davisson upon the bank for his commission, and both Davisson and Mrs. Owens demanded their respective alleged shares of the $9,173.32 of the bank, and this suit was brought by them to recover the respective amounts alleged to be due them from the bank for its alleged wrongful return of the check or its equivalent to Berryman. Berryman was not made a party to the suit.

(Signed) "WILLIAM H. POPE,
"Chief Justice."

(Tr., p. 123.)

The Supreme Court of the Territory of New Mexico held on the first appeal, and was bound by this holding on the second appeal, that papers deposited with a bank in escrow could not be redelivered by the bank to either of the parties, notwithstanding one of the parties was wholly in default in the performance of everything he was bound to perform, unless such party consented to the redelivery. That court further held that the bank's liability was to be determined by the contract between Owens and Berryman, to which contract the bank was not a party, and the terms of which contract were not even brought to its knowledge.

That court further held that a statement of a cause of action on a contract, against one not a

party to such complaint, constitutes a cause of action against one who is a party to such action, even though the latter is not a party to the contract upon which such complaint is based, or the agent of either party, in so far as the subject-matter of such contract is concerned. These holdings of the Territorial Supreme Court are assigned as error in this court.

As this case was tried the second time in the District Court, upon practically the same facts, and an appeal taken in order to get a final adjudication of the Territorial Supreme Court, so that the matter could be reviewed by the Supreme Court of the United States, the second opinion of the Supreme Court of the Territory did nothing more than to hold that the first opinion stated the law of the case. The second opinion is found in the transcript of record at page 130. The first opinion, being the controlling opinion, is stated as follows:

> "The court below held that the bank's liability was fixed and limited by the memorandum above mentioned, and that as no abstract "approved by the purchaser's attorney" was presented to the bank on or prior to September 10th, that after said date 'it became the duty of the bank to deliver said check or its proceeds to C. C. Berryman, one of the parties to the escrow agreement upon demand.'
>
> "Now, it is admitted that the bank was acting as agent for both parties as far as the escrow itself was concerned, and the ques-

tion is, did the bank act as it should have acted, or did it fail in its duty to either party?

"Admitting the correctness of this holding for the sake of argument, the question then is, did the bank fulfill its duty to the appellants as fixed by the memorandum? To this question we think the reply should be in the negative, for the reason that nowhere in the memorandum was the bank authorized to make any delivery of any paper, money or anything.

"Had the appellants both agreed that Mr. Berryman should have his money or check back, then the bank would have been relieved of any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken sides, and when it failed to secure appellants' consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance.

"However, it took sides in this matter and will be held as it should be, to have acted at its peril and to be responsible to appellants for the fund if they can show a right to the same under the contract made with Berryman, either in its original form or as amended by the parties to it.

"The law governing the duties of the bank in this case is well stated by Page in his work on contracts:—

" 'The depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without

the latter's consent, nor save upon the fulfillment of the agreed conditions deliver it to the latter without the former's consent.'

2 Page, Contracts, 585.

"There happened no condition, as set forth in the memorandum, upon the fulfillment of which, or failure to fulfill the bank was directed to return the papers to either party.

"We do not deem it necessary upon this appeal to decide any of the other questions raised by the brief of appellants, except that the appellees will be held to be responsible to the appellant if they, upon a re-trial of this cause, shall sustain a right to the money the bank had belonging to Berryman and paid over to him in violation of its duty to appellants.

"The judgment of the lower court is reversed and remanded with instructions to reinstate the cause and proceed in accordance with the views expressed in this opinion.

"MERRITT C. MECHEM, *A. J.*

"We concur:

"JOHN R. MCFIE, *A. J.*
"FRANK W. PARKER, *A. J.*
"IRA A. ABBOTT, *A. J.*
"EDWARD R. WRIGHT, *A. J.*

"POPE, *C. J.*, having heard this cause below, did not participate in this opinion." (Tr., p. 128.)

From this opinion the appellant assigns error as follows:

"First. The court erred in holding and deciding that the holder of papers deposited

with it in escrow could not re-deliver the paper deposited by one of the parties, to him, after the other party to the escrow agreement was in default, in the performance of everything he was bound to perform—without the consent of such other party in default, or order of court.

"Second. The court erred in holding that the appellant bank's liability in this action is not limited by the escrow agreement.

"Third. The court erred in holding that the liability of the bank is to be determined by the contract of Owens and Berryman, to which contract the bank was not a party, and the terms of which were not brought to its knowledge.

"Fourth. The court erred in holding that the contract between Berryman and Owens did not become unenforcible under the Statute of Fraud.

"Fifth. The court erred in holding that the complaint of Davisson stated facts sufficient to constitute a cause of action against the Citizens National Bank.

"Sixth. The court erred in holding that the cross-complaint of Etta Owens stated facts sufficient to constitute a cause of action against the appellant Citizens National Bank.

"Seventh. The court erred in holding that the statement of the cause of action upon the contract against one not a party to such complaint, constitutes a cause of action against one who is a party to such action, even though the latter was not a party to the contract upon which such complaint was based, nor an agent of either party in so far as the subject-matter of such contract was concerned."

Comment.

It will be seen that the Supreme Court of the Territory of New Mexico based its opinion upon the authority of section 585 of vol. II of Page on Contracts. An examination of this section shows the facts in the case at bar do not warrant the adoption of the rule of law set forth in Page on Contracts (*supra*).

We call the court's attention to the fact that in the chapter in Page on Contracts where this statement is found the author was not treating of the duty of a holder of an escrow, but was treating the subject of the delivery of contracts. The quotation which the court makes from Page is in turn a quotation from the opinion in the case of Davis *vs.* Clark, 58 Kansas, 100; 48 Pac., 565, and that court in turn makes this statement on the authority of two former Kansas cases, to-wit: Roberts *vs.* Mullenix, 10 Kansas, 22, and Grove *vs.* Jennings, 46 Kansas, 366; 26 Pac., 738, and in commenting on the case of Roberts *vs.* Mullenix, *supra,* the court in Davis *vs.* Clark, *supra,* says: "In the case of Roberts *vs.* Mullenix, *supra,* the delivery was made to the grantee without the knowledge of the grantor and without the fulfillment of the conditions;" and in the case of Groves *vs.* Jennings, *supra,* re-delivery to the grantor was made without the authority of the grantee, *and without default in the performance of the conditions upon his part.* (Italics ours.) No authority is cited by the ap-

pellees and we are confident cannot be cited to sustain the proposition that the holder of an escrow can not return the papers to one party to the escrow agreement after default of the other party in meeting the conditions of the escrow agreement.

We believe the law relative to the duty of the holder of an escrow, where the time limit therein has expired leaving conditions unperformed, is correctly set forth in the authorities of—

16 Cyc., 576, 584.

11 Am. and Eng. Enc. of Law, page 352.

Humphrey *vs.* Richmond, etc., R. R. Co., 13 S. E., 985.

Burlington R. R. Co. *vs.* Palmer, 42 Iowa, 222.

Bodwell *vs.* Webster, 113 Pick., 411.

Hayton *vs.* Meeks (Ark.), 14 S. W., 864.

Equity Gaslight Co. *vs.* McKeige (N. Y.), 34 N. E., 898.

Riggs *vs.* Trees (Ind.), 5 L. R. A., 696.

Hoyt *vs.* McLagan, 87 Ia., 146.

Not only do the facts and the law on this appeal indicate that the appeal is in good faith, but must indicate that there is absolutely no grounds for the opinion reached by the Supreme Court of the Territory of New Mexico in this cause.

Respectfully submitted,

WILLIAM C. REID,
JAMES M. HERVEY,
Attorneys for Appellants.

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File No. 23060. Term No. 551

In the Supreme Court of the United States

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL,
Appellants,

VS.

GEORGE A. DAVISSON and FAY ETTA OWENS,
Appellees.

In the Supreme Court, October Term, 1911, Appeal from Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLEES ON MOTION TO AFFIRM.

G. A. RICHARDSON,
Roswell, New Mexico,
Attorney for Appellees.
W. A. DUNN,
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Smith-Grieves Typesetting Co., 714-716 Baltimore, Kansas City, Missouri.

In the Supreme Court of the United States

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL,
Appellants,

VS.

GEORGE A. DAVISSON and FAY ETTA OWENS,
Appellees.

File No. 23060. Term No. 984.

In the Supreme Court, October Term, 1911, Appeal from Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLEES ON MOTION TO AFFIRM.

The motion of appellees to affirm the judgment in this case is on the grounds that the appeal is taken for delay only, and that the questions on which the decision of the cause depends are frivolous, both

grounds being manifest of record. The questions raised may be readily perceived from the statements contained in the opinions and findings of the Territorial Supreme Court.

Nature of the Action.

It may be premised that this action was instituted in the District Court of Chaves County, New Mexico, by the appellee George A. Davisson, as plaintiff. Davisson sued as defendants, the appellee Etta Owens and the appellant Citizens National Bank.

Mrs. Owens had sold to one C. C. Berryman certain lands, and entered into a written contract with him concerning conveyance of title, terms of payment and other details. The plaintiff Davisson, a real estate broker, acted as agent for Mrs. Owens in the transaction, and was to receive a commission of $5,000.00 for procuring a purchaser for the property. Berryman drew a check on an Arkansas bank for $9,173.32, in part payment of the purchase money, and this, with the contract of sale, was placed in escrow with appellant Bank, pending the carrying out of further terms of the trade.

On this deposit being made, Mrs. Owens gave Davisson a written order on appellant for $5,000.00, to be paid when the deal with Berryman should be closed or terminated. Berryman subsequently abandoned the contract and thereby under the terms of the contract of sale forfeited to Mrs. Owens the sum represented by his check. This check had been cashed by appellant, and on Berryman's abandonment of the contract he made demand on appellant for return of

the money, which appellant complied with to the extent of placing the money to Berryman's credit on its books. (Tr., p. 65.) Before this, appellees had notified appellant that they claimed the money and Davisson had presented to it the order he held for $5,000.00.

On appellant refusing the demand of appellees for the money, Davidson brought suit, making appellant and Mrs. Owens defendants. Mrs. Owens filed a cross-bill against appellant. At the trial in District Court a jury was waived and the court at that time found the issues in favor of the Bank. (See statement of the court, printed Record, p. 128, and pleadings in the case, pp. 2-19.) Davisson and Mrs. Owens appealed to the Supreme Court of the Territory of New Mexico, and we here append the statement and opinion of that court, speaking through Justice Mechem:

Opinion of New Mexico Supreme Court, Settling Law of the Case.

"STATEMENT OF FACTS.

> The appellant Owens and one Berryman entered into a contract for the sale of lands, the appellant Davisson acting as agent for Owens. The conditions of the contract are not material here. After signing up the contract, Berryman drew his check upon an Arkansas bank in favor of Davisson, as agent, for $9,173.32, the check was placed in an envelope with the contract of sale and the parties in company went to the appellee Bank and delivered the envelope containing the check and contract to the cashier of the Bank, who, as the court found, in the presence and with the concurrence of all the parties,

made the following written indorsement on the envelope:

'Check enclosed to be held in escrow until September 10th, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens Bank & Trust Company, Arkadelphia, Ark., for examination. No money to be paid over until abstract is approved.' (Signed) 'J. J. Jaffa, Cashier.'

Berryman thereafter made demand upon the Bank for the return of the money, the check in the meantime having been cashed and the money in the hands of the Bank. The Bank called upon the appellants for their consent, which, for various reasons, they refused to give, but the Bank delivered the money to Berryman. Suit was brought by Davisson against the Bank to recover his commission on the sale. Mrs. Owens and her co-executors of the estate of Solon M. Owens, deceased, were made parties defendants. They answered and filed a cross-complaint against the Bank and asked judgment for the money. The case was tried by the court without a jury. Judgment for the appellee and appellants bring this appeal.

OPINION OF THE COURT.

Mechem, J.: The court below held that the Bank's liability was fixed and limited by the memorandum above mentioned, and that as no abstract 'approved by purchaser's attorney' was presented to the Bank on or prior to September 10th, that after said date 'it became the duty of the Bank to deliver said check or its proceeds to C. C. Berryman, one of the parties to the escrow agreement, upon demand.'

Now it is admitted that the Bank was acting as agent for both parties as far as the escrow itself was concerned, and the question is, Did the Bank act as it should have acted, or did it fail in its duty to either party?

Admitting the correctness of this holding for the sake of argument, the question then is, Did the Bank fulfil its duty to the appellants as fixed by the memorandum? To this question we think the reply should be in the negative, for the reason that nowhere in the memorandum was the Bank authorized to make any delivery of any paper, money or anything.

Had the appellants both agreed that Mr. Berryman should have his money or check back, then the Bank would have been relieved from any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken sides, and when it failed to secure appellants' consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance.

However, it took sides in this matter and will be held, as it should be, to have acted at its peril and to be responsible to appellants for the fund if they can show a right to the same under the contract made with Berryman, either in its original form or as amended by the parties to it.

The law governing the duties of the Bank in this case is well stated by Page in his work on Contracts:

'The depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor save upon the fulfilment of the agreed conditions deliver it to the latter without the former's consent.' (2 Page, Contracts, 585.)

There happened no condition, as set forth in the memorandum, upon the fulfilment of which, or failure to fulfil, the Bank was directed to return the papers to either party.

We do not deem it necessary upon this appeal to decide any of the other questions raised by the brief of appellants, except that

the appellees will be held to be responsible to the appellants if they, upon a retrial of this case, shall sustain a right to the money the Bank had belonging to Berryman and paid over to him in violation of its duty to appellants.

The judgment of the lower court is reversed and remanded with instructions to reinstate the cause and proceed in accordance with the views expressed in this opinion."

Findings of Fact by District Court,

APPROVED BY TERRITORIAL SUPREME COURT IN OPINION FROM WHICH THIS APPEAL IS TAKEN.

The case was retried in District Court on the same pleadings and evidence as were embraced in the record on appeal (Tr., p. 102) and the court made the following findings of fact (Tr., p. 109):

"(1) That the Owens estate had, up to September 10th, 1908, failed to make good title to Berryman; (2) that at or about that date a further conference was held in which it was orally agreed between Berryman and the estate that the latter should have thirty or forty days in which to secure an order of court; (3) that in consideration of this said estate went immediately to secure said order, at considerable expense for attorney's fees, expenses, etc., and did secure the same on October 5th, 1908; (4) that further, in consideration of this, Berryman, who was stopping on expense at the hotel in Roswell, was to be given and was given by the Owens estate, possession of the premises on September 10th, 1908; (5) that he remained in possession thereof, exercising acts of ownership thereon until September 22d, 1908; (6) that on said date he repudiated and abandoned said contract and left the territory; (7) that at said date the time agreed upon for securing an order of sale

through the courts had not expired; (8) that the abandonment of the contract was without just cause and subjected Berryman to a forfeiture of the escrow money in the hands of the Bank. This condition of things under the opinion of the Supreme Court renders Berryman liable, and the court so finds."

Judgment in favor of Davisson for the amount of his order, and in favor of Mrs. Owens for the remainder of the Berryman check, was rendered by the District Court against the Citizens National Bank, from which it appealed to the Supreme Court of the Territory. On that appeal the findings and judgment of the District Court were approved in the following statement and opinion by Justice Roberts (Tr., p. 130):

"STATEMENT OF FACTS.

This cause of action was before this court upon practically the same record and upon the former hearing the case was reversed with instructions to the lower court to reinstate the cause and proceed in accordance with the views therein expressed. (113 Pac. 598.) Upon the second trial of the cause in the court below no new pleadings or amendments to the pleadings were made and no additional evidence was introduced. The court below, in accordance with the mandate of this court, made findings of fact and conclusions of law and entered judgment for the appellees, from which judgment this appeal is prosecuted.

OPINION OF THE COURT.

Roberts, J.: Upon this second appeal we are limited to a consideration of but one question, *viz.*, Did the lower court reach its final decree in due pursuance of the previous opinion

and mandate of this court? We find that it did. * * * And the cause will therefore be affirmed."

An appeal was taken to the Supreme Court of the United States, and it appears in the special verdict of the Territorial Supreme Court that Mrs. Owens advised the appellant Bank of a verbal extension of the contract made with Berryman. (Tr., p. 124.)

Appellant's Assignment of Errors.

In this Court the appellant Bank assigns the following errors (Tr., p. 122):

"First. The court erred in holding and deciding that the holder of papers deposited with it in escrow could not redeliver the paper deposited by one of the parties, to him, after the other party to the escrow agreement was in default, in the performance of everything he was bound to perform—without the consent of such other party in default, or order of court.

Second. The court erred in holding that the appellant Bank's liability in this action is not limited by the escrow agreement.

Third. The court erred in holding that the liability of the Bank is to be determined by the contract of Owens and Berryman, to which contract the Bank was not a party, and the terms of which were not brought to its knowledge.

Fourth. The court erred in holding that the contract between Berryman and Owens did not become unenforcible under the Statute of Frauds.

Fifth. The court erred in holding that the complaint of Davisson stated facts sufficient to constitute a cause of action against the Citizens National Bank.

Sixth. The court erred in holding that the cross-complaint of Etta Owens stated facts sufficient to constitute a cause of action against the appellant Citizens National Bank.

Seventh. The court erred in holding that the statement of the cause of action upon the contract against one not a party to such complaint, constitutes a cause of action against one who is a party to such action, even though the latter was not a party to the contract upon which such complaint was based, nor an agent of either party in so far as the subject matter of such contract was concerned."

Comment.

Appellant was the holder of a fund in which it had no interest, and the ownership of which had become vested in appellees. It was notified of the claim made by appellees, forbidden to pay the money to Berryman, and without obtaining their consent thereto placed the money to Berryman's credit.

Under such circumstances an attempt by the Bank to defend this suit is wholly unjustifiable. The section of Page on Contracts from which Judge Mechem quotes an extract in the opinion given above is decisive of this controversy. And the whole case of appellant contravenes elementary principles.

> "This principle obtains in all cases of bailment, and the *jus tertii* may be enforced even as against the contract of bailment, and when enforced, will be made available to excuse and protect the bailee from performance or delivery according to its terms; and it is founded in reason, as well as sustained by a great preponderance of authority."
>
> *Wells* v. *Am. Exp. Co.*, (Wis.) 42 Am. Rep. 695.

> "The moment the owner comes and demands possession of the property, and it is denied him, it is a conversion."
> *Doty* v. *Hawkins,* (N. H.) 25 Am. Dec. 459.

In an escrow,

> "If the time is set, a failure to perform within the agreed period will not preclude, after a performance, the grantee's or obligee's right to a delivery of the instrument where time was not an element of the contract, or where the conduct of a grantor or obligor has acted as a waiver of the time element of the condition."
> 16 Cyc. 578.

So also,

> "If the depositary refuses to deliver, the remedy is not against the other party to compel specific performance of the escrow contract, but against the depositary to obtain possession of the instrument."
> *Id.* 585.

In the case at bar the Bank assumed the burden of defending Berryman's conduct. If appellees failed in their duty to Berryman, he, as the party aggrieved, should have applied to the courts for relief. Instead of doing this, he arranged with the Bank to fight his battle, and bolted to a foreign jurisdiction.

The Bank, being sued, sought to defend on grounds wholly personal to Berryman. He alone could plead the Statute of Frauds (9 Enc. Pl. & Pr. 703), and he alone could complain of a fraud committed on him as a purchaser. (9 Enc. Pl. & Pr. 681; 14 A. & E. Enc. of Law, 2d Ed., 156.) Yet the Bank plead both these defenses. (Tr., pp. 16-17.)

They were not available.

> "The truth is that the defendant has no valid defense to this action. It had no right

to the stock. It was a mere custodian thereof. Its only interest was to protect itself against the claim and demand which it alleges was made upon it by the Rucco-Homestake Mining Company to deliver the stock to it. The ordinary course was for the defendant to have deposited the stock in court, in order that proper steps might thereafter have been taken by the respective parties to establish their claim to the shares of stock. The defendant, however, chose to become a partisan on behalf of the Rucco-Homestake Mining Company, and set up a defense for it which is wholly without merit."

Clarke v. *Eureka County Bank*, 123 Fed. 922.

The first and second assignments of error contradict these very principles. The third assignment is without foundation in fact, except to the extent that the Bank had knowledge of the conflicting claims of the parties when it chose to take sides with Berryman. The remaining assignments are wholly frivolous and unworthy of discussion.

The appellant in this case has prevented the collection of a just claim against it for a period, now, of nearly four years, and as it most clearly has no defense to this action, we respectfully ask that the judgment against it be affirmed on this motion.

Respectfully submitted,

G. A. RICHARDSON,
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Attorney for Appellees.
W. A. DUNN,
Roswell, New Mexico,
Attorney for George A. Davisson, Appellee.
ED. S. GIBBANY,
Roswell, New Mexico,
Attorney for Etta Owens et al, Appellees.

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No. 551.

In the

Supreme Court of the United States

October Term, 1912.

THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL., *Appellants*,

vs.

GEORGE A. DAVISSON and FAY ETTA OWENS, *Appellees.*

ARGUMENT FOR APPELLEES.

G. A. RICHARDSON,
Attorney for Appellees.
W. A. DUNN,
Attorney for George A. Davisson, Appellee.
ED. S. GIBBANY,
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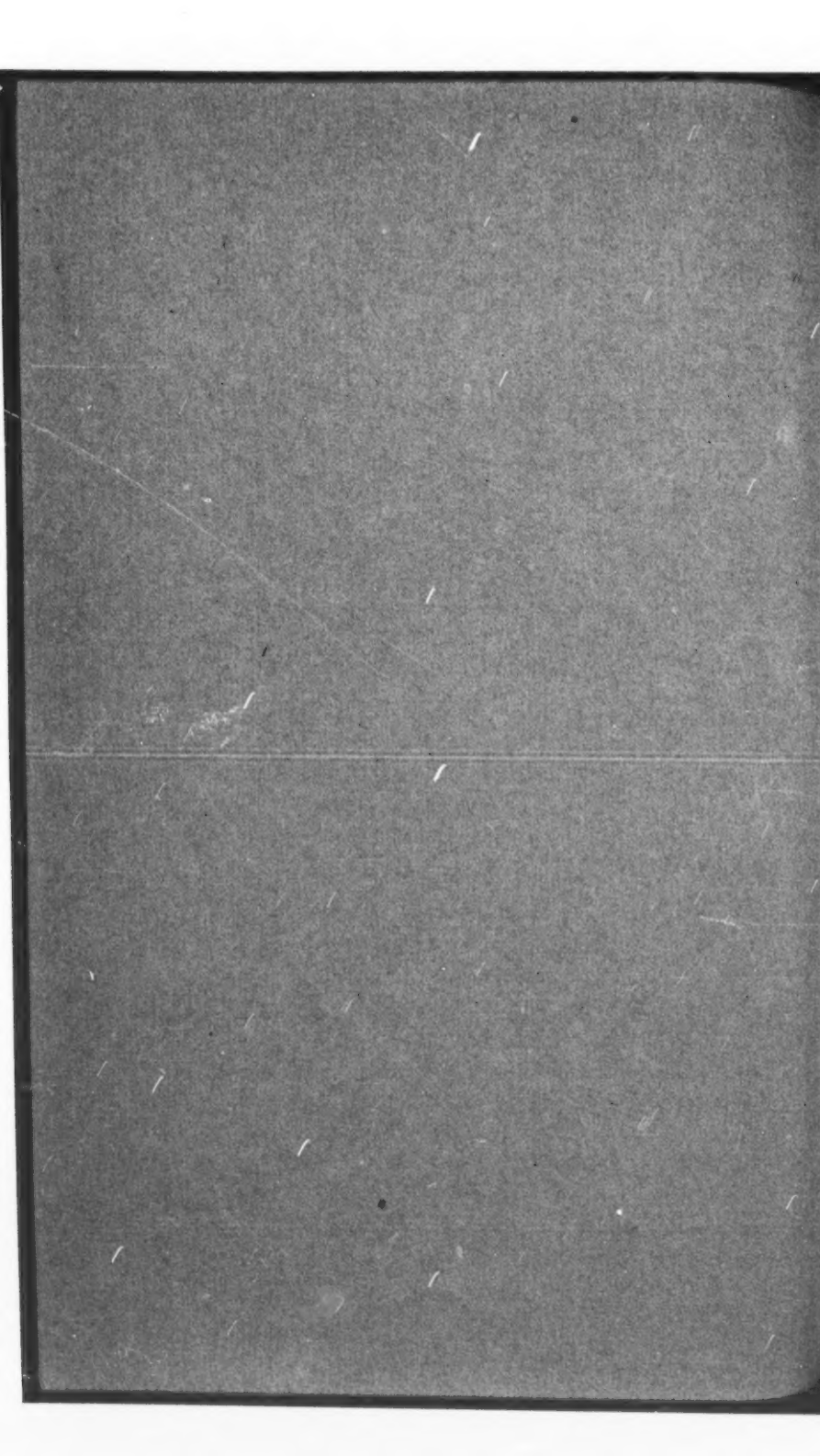

In the

Supreme Court of the United States

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THE CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, ET AL., *Appellants*,

vs.

GEORGE A. DAVISSON and FAY ETTA OWENS, *Appellees*.

No. 551.

THE FACTS.

There are certain salient facts derived from admissions in the pleadings and otherwise, which it is needful the court should bear in mind in order to render the findings of the Territorial Supreme Court, as set forth in its Special Verdict, intelligible; and we respectfully ask this court to peruse the following statement of the facts, to the end that the merits of the case may be clear, in determining any question of law.

1. On August 21, 1908, the appellee, Etta Owens, through her agent, the appellee, Davisson, sold to one C. C. Berryman certain lands in Chaves County, New Mexico (tr. 3, 123).

2. A "Sales Contract" was entered into setting forth the terms of the trade, which contract is attached to and made a part of the First Amended Complaint in this action (tr. 3, 5).

3. The provisions of this "Sales Contract" have never been questioned by the lower courts or by any party to the record; nor have the plaintiff's allegations concerning the same been denied in any pleading. Section 2685, Sub-Sec. 67, Comp. Laws of New Mexico (1897), is as follows: "Every material allegation of the complaint not controverted by the answer, * * * shall, for the purposes of the action, be taken as true."

4. As between Mrs. Owens and Berryman the "Sales Contract" must be looked to for the purpose of determining their respective rights, in and to the cash payment made on the land, which payment is the subject-matter of this suit. There are certain material provisions of the contract to be kept in mind, namely:

(a) Berryman agreed to pay $10,000.00 of the consideration, as follows: "$10,000.00 cash, this day paid, the receipt of which is hereby acknowledged." (tr. 5.)

(b) Mrs. Owens agreed to furnish *to the party of the second part* (Berryman) an abstract of title, within ten days, showing title to the land in her (tr. 5).

(c) Berryman was to have until Sept. 10th, to examine abstract, and if title was shown in Mrs. Owens, the deal was to "be closed at Roswell, New

Mexico, on or before September 10th, 1908, by the party of the first part, (Mrs. Owens) executing a warranty deed," etc. (tr. 5).

(d) If the abstract did not show a good title in Mrs. Owens, Berryman was to point out his objections thereto, and Mrs. Owens was to have ten days to cure said objections. But if the title could not be made good within such time, then Mrs. Owens was to perfect it, at her expense "promptly, in accordance with the requirement of the party of the second part within the (a?) time stated; and if the party of the first part fails, neglects or refuses to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part who shall repay at Roswell, New Mexico, such sum of money as is expended by the party of the second part in perfecting said title, and if upon examination of said title it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled and the said $10,000.00 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part." (tr. 6).

(e) Performance by Mrs. Owen and failure to perform by Berryman, subjected the latter to a forfeiture of the cash payment at the former's option. (tr. 6).

5. The "Sales Contract," together with Berryman's check for $9,173.32, (that being the cash payment actually made) were placed in an envelope and delivered by the parties to the appellant, bank, whose

cashier endorsed the envelope as an escrow, in the following language:

> "Check enclosed to be held in escrow until September 10, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to Citizens Bank and Trust Company, Arkadelphia, Arkansas, for examination. No money to be paid over until abstract is approved by purchaser's attorneys.
>
> (Signed) J. J. JAFFA, *Cashier.*"

6. On the date such escrow was made Mrs. Owens delivered to plaintiff the following order: (tr. 4, 7).

> "The Citizens National Bank, Roswell, New Mexico:
>
> "You are hereby authorized to pay to G. A. Davisson, $5,000.00, being commission in full on the sale of my 360 acres of land to C. C. Berryman, at the time the said deal is closed or terminated.
>
> "Witness my hand this 21st day of August, 1908.
>
> (Signed) "MRS. ETTA OWENS."

which order was on the 21st day of August, 1908, as well as subsequent thereto, presented to appellant, Citizens National Bank, and demand for payment made (tr. 4).

7. In the latter part of August or first of September, 1908, appellee, Davidson, delivered to Berryman an abstract of title to the property (tr. 21, 22); Mr. Berryman, himself, admitting that he received the abstract, which, he says, was forwarded

to the Citizens Bank & Trust Co., at Arkadelphia, Ark., to be examined by his attorney (tr. 84).

8. About the 10th of September, 1908, Berryman and Mrs. Owens came to an understanding concerning the character of title he desired which necessitated the procurement of a certain court order; and by mutual consent the time for closing the trade was extended, pending the requisite proceeding in court; but Berryman went into immediate possession of the premises (tr. 109).

9. While proceedings were pending for the court order required by Berryman, and before the time agreed on for obtaining it had expired, he abandoned the premises and repudiated his contract. He left New Mexico a few days later (tr. 109).

10. After the abandonment of the contract by Berryman, he demanded, first of the appellee (tr. 87) and then of appellant, bank, to return to him the money represented by his check (the check having been cashed by the bank) and it was returned to him over the protest of appellees (tr. 36, 128) in manner following: the bank cashier placed the money to Berryman's credit, but held it in the bank; and an additional deposit was also required of him by way of indemnity (tr. 65).

11. The bank was notified by the agent of Mrs. Owens, of the agreement made Sept. 10th, concerning the character of title demanded by Berryman, and of the extension of time agreed to for procuring an order of court (tr. 36, 124).

12. The bank called on appellees for their consent to pay Berryman the money, which "for various reasons they refused to give." (tr. 36, 128).

These material and undisputed facts point out,

unmistakably, where the justice of the case lies, but they do not all appear in the Special Verdict sent up by the Supreme Court of New Mexico. That is, indeed, a somewhat remarkable statement, and a perusal of it is calculated to impress one with the view that its author was attempting a legal argument to overthrow the judgment rendered, rather than a recital of facts to sustain it. But the Special Verdict establishes the following:

1. That a contract was made between Mrs. Owens and Berryman for the sale and purchase of lands (tr. 123). The terms and conditions of this contract are brought before the court in the pleadings and are summarized above.

2. The contract of sale and purchase, together with Berryman's check to Mrs. Owens, in part payment of the consideration, were deposited with the appellant, bank, whose cashier endorsed an escrow on the papers as above noted. (tr. 123-4).

3. On September 10th, 1908, Mrs. Owens and Berryman "made a verbal agreement to extend the time in which to perfect the title to the land" and Mrs. Owens, by her agent, notified the bank of this extension (tr. 124).

4. Notwithstanding the extension, it appears that "Berryman demanded the return of his check, the equivalent of which was returned to him by the bank;" the logical and only effect of which was to then and thereby abandon his contract of purchase (tr. 124).

FURTHERMORE: Appellants state, on page 9 of their brief, that this case is practically before this court on the errors alleged to have been committed by the Supreme Court of New Mexico on the first

appeal. This being true, the facts on which the court proceeded in that appeal, and set forth in its opinion, are to be taken as justified by the evidence. (*Thompson* v. *Ferry*, 180 U. S. 484, 45 L. Ed. 633). Following is the court's Statement of Facts (tr. 128):

> "The appellant, Owens, and one Berryman entered into a contract for the sale of lands, the appellant Davisson acting as agent for Owens. The conditions of the contract are not material here. After signing up the contract, Berryman drew his check upon an Arkansas bank in favor of Davisson, as agent, for $9,173.-32, the check was placed in an envelope with the contract of sale and the parties in company went to the appellee bank and delivered the envelope containing the check and contract to the cashier of the bank, who, as the court found, in the presence and with the concurrence of all the parties, made the following written endorsement on the envelope:
>
> " 'Check enclosed to be held in escrow until September 10th, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens Bank and Trust Company, Arkadelphia, Ark., for examination. No money to be paid over until abstract is approved.
>
> (Signed) " 'J. J. JAFFA, *Cashier.*'
>
> "Berryman thereafter made demand upon the bank for the return of the money, the check in the meantime having been cashed and the money in the hands of the bank. The bank called upon the appellants for their consent, which, for various reasons, they refused to give, but the bank delivered the money to Berryman. Suit was brought by Davisson against the bank to recover his commission on the sale. Mrs. Owens and her co-executors of the estate of Solon M. Owens, deceased, were made parties defendants. They answered and filed a cross-complaint against the bank and asked judgment for the money."

IN ADDITION: The findings of fact by the district court of the last trial were adopted, to all intents and purposes, by the Territorial Supreme Court, to sustain the judgment brought here in review; and other findings were made in the nature of a Special Verdict. These respective findings are, therefore, relevant. (*Apache County* v. *Barth*, 177 U. S. 538, 44 L. Ed. 878). The trial court found as follows (tr. 109):

> "(1) That the Owens Estate had up to September 10th, 1908, failed to make good title to Berryman; (2) That at or about that date a further conference was held in which it was orally agreed between Berryman and the estate that the latter should have thirty or forty days in which to secure an order of court; (3) That in consideration of this said estate went immediately to secure said order, at considerable expense for attorney's fees, expenses, etc., and did secure the same on October 5th, 1908; (4) That further, in consideration of this, Berryman, who was stopping on expense at the hotel in Roswell, was to be given and was given by the Owens estate possession of the premises on September 10th, 1908; (5) That he remained in possession thereof, exercising acts of ownership thereon until September 22nd, 1908; (6) That on said date he repudiated and abandoned said contract and left the Territory; (7) That as said date the time agreed upon for securing an order of sale through the courts had not expired; (8) That the abandonment of the contract was without just cause and subjected Berryman to a forfeiture of the escrow money in the hands of the bank."

The Territorial Supreme Court approved the action of the trial court in the following language (tr. 130):

> "Upon this second appeal we are limited to a consideration of but one question, viz., did the lower court reach its final decree in due pursuance of the previous opinion and mandate of this Court? We find that it did. * * * and the cause will therefore be affirmed."

Discussion of the Facts.

A clear understanding of the facts renders the legal questions raised by appellants extremely simple.

Under the findings set forth in the record, it becomes *absolutely impossible* to adjudge Mrs. Owens in any legal default up to the time Berryman abandoned his contract. For, if, as found by the trial court, and set forth in the Special Verdict, Mrs. Owens was, on September 10th, granted an extension of time to perfect title to the land; if she and Berryman then reached an agreement, pursuant to the provisions of the "Sales Contract," or otherwise, fixing a future time at which she should tender title, it follows, inevitably, that she could not be in default until that time arrived. The "Sales Contract" gave Berryman until the 10th of September to point out his objections to the title, and Mrs. Owens ten days thereafter to cure said objections; and if the objections could not be cured in ten days, she was to be given still further time (tr. 6).

Now, the appellant, bank, was the agent of both parties for certain purposes, and if Mrs. Owens were not in default as to Berryman, the principal, she could not be in default as to his agent, the bank.

The effort of the appellants to get the bank away from its position of agency, is, with due respect to opposing counsel, almost puerile. Their position, if we understand it, is, that the escrow written by the bank cashier justified the bank in a return of the money to Berryman, because abstract and deed were not deposited with it, the bank, prior to September 10th. Or, in other words; notwithstanding Berryman may have been furnished with an abstract as provided by the "Sales Contract;" and notwithstanding he may have agreed with Mrs. Owens to make a certain and definite extension of time beyond September 10th, in which she might tender a deed; and notwithstanding the bank may have received notice of the extension so made; yet, in the face of all this, it became the bank's duty to return to Mr. Berryman the earnest money.

The cashier's escrow, standing alone, is meaningless; and it must be read in the light of surrounding circumstances, and of the provisions of the "Sales Contract," in order to give it any meaning. There are no parties named in it, and it is not even specified who is to perform any of its requirements. It provides:

> (a) Check enclosed to be held in escrow until September 10, when final settlement is to be made.
>
> (b) Deed and abstract to be placed in escrow with this.
>
> (c) Abstract to be forwarded to Citizens Bank and Trust Company, Arkadelphia, Arkansas, for examination.
>
> (d) No money to be paid over until abstract is approved by purchaser's attorneys.

These several clauses certainly impose no specific duty on any one in particular. If clause (a) be regarded as an instruction to the bank to hold the check until final settlement is made on a day certain, it fails to point out who is to make the settlement, or to whom the check is to be then delivered; and if no kind of final settlement is made, further action by the bank is not even suggested.

Clause (b) is without signification. For aught that appears to the contrary the papers to be deposited might refer to an abstract of the president's last message and a deed to a mining claim in Alaska. We have no intimation as to what disposition, if any, is to be made of the deed, finally. Manifestly, this clause imposes no duty on Mrs. Owens. Indeed, so far as the abstract is concerned, we may, by reverting to the facts, ascertain that she was bound by the "Sales Contract" to deliver a certain abstract to Berryman. If Berryman wished to place the same in escrow with the bank, he was the proper party to deliver it; but, it seems that he chose, later, to assume the risk of forwarding it to Arkansas and never availed himself of the bank's services and responsibility.

Clause (c) possesses the same obscurity as (b). An abstract of the president's last message, perhaps, is to be forwarded to a named trust company for examination.

Clause (d) refers to a purchaser; but who he is, or what he purchased, is not indicated; and the inhibition against the payment of money could have no bearing in the absence of any light as to the payee.

For a banking institution to come before a tri-

bunal of justice, asserting that it knows nothing more of a transaction committed to its care than is embodied in the words of this escrow, and to set up that it assumed to act thereon and determine the rights of others, is little short of trifling with the court.

First Assigned Error.

The first error assigned by appellants is answered by the statement that Mrs. Owens was never placed in default. Whatever default, if any, might otherwise have been claimed, was waived by Berryman, when, on September 10th, he took possession of the land and granted to Mrs. Owens an extension of time to perfect title (tr. 109, 124). Even where time is declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as, for instance, where he recognizes the contract as still in force after the time for the performance has passed, or directs changes making a longer time necessary.

9 Cyc. 608:
Brown v. *Guarantee Trust, etc. Co.*, 128 U. S. 453;
Phillips, etc. Const. Co. v. *Seymour*, 91 U. S. 646;
Amoskeag Mfg. Co. v. *U. S.*, 12 Wall. 592;
McAlpine v. *Reicheneker*, (Kans.) 42 Pac. 339;
Kent v. *Church of St. Michael*, (N. Y.) 18 L. R. A. 331;
Welch v. *Dutton*, 79 Ill., 465.

Second Assigned Error.

The second assigned error is answered by the fact that the alleged escrow agreement, standing alone, is devoid of all meaning, and imposes no duty or obligation on any person, whomsoever.

Third Assigned Error.

The third assigned error is, perhaps, answered by the statement that the court did not make the holding complained of. As a matter of law, however, the bank ought to be held to a knowledge of all the provisions of the "Sales Contract." That instrument was in its possession, in the same envelope from which it took a check to be cashed, and it had only to examine the paper to ascertain the contractual relations of the interested parties. If it wilfully shut its eyes to the means of knowledge, when a controversy arose between the parties, it has no one to blame but itself. If a depository, bailee or holder of an escrow negligently pays over or delivers a fund in its possession to the wrong person, it is guilty of conversion and answerable therefor.

3 A. & E. Enc. of Law (2nd Ed.) 762;
9 A. & E. Enc. of Law (2nd Ed.) 291, 292;
Southern Railway Co. v. *Atlanta Nat. Bank*, 112 Fed. 861;
Clark v. *Eureka County Bank*, 123 Fed. 922;
Kahaley v. *Haley*, (Wash.) 47 Pac. 23;
Doty v. *Hawkins*, (N. H.) 25 Am. Dec. 459;
Wells v. *American Express Co.*, (Wis.) 42 Am. Rep. 695;
McAnelly v. *Chapman*, 18 Tex. 198;
Dusky v. *Rudder*, 80 Mo. 400;
Bushnell v. *Chautauqua County Nat. Bank*, 74 N. Y. 290.

Fourth Assigned Error.

The fourth assigned error may be answered in three ways, namely:

1. The Statute of Frauds was not available to the bank because it was not a party to the contract sought to be enforced. (9 Enc. Pl. & Pr. 703).

2. The facts of the case do not raise any question under the Statute of Frauds, the "Sales Contract" having provided for everything subsequently done by the parties looking to the consummation of the trade.

3. By the provisions of the "Sales Contract" the Berryman check became earnest money, and passed into the constructive possession, at least, of Mrs. Owens. He would not be permitted to recover this payment after stopping short and abandoning his contract. One who pays earnest money on a contract for the sale of lands, cannot recover the same until he shows that he is willing to consummate the bargain made.

Brockenhausen v. *Bowes*, 50 Ill. App. 98;
Hansbrough v. *Peck*, 5 Wall. 497;
Glock v. *H. & W. Colony Co.*, (Cal.) 43 L. R. A. 199, 55 Pac. 713;
Johnson v. *Puget Mill Co.*, (Wash.) 68 Pac. 867;
23 Am. Dig. (Century Ed.) Col. 2350; citing cases covering two and one-half pages, and relating to contracts resting wholly in parol.

Fifth, Sixth and Seventh Assigned Errors.

These assigned errors do not, in our opinion, justify serious consideration. To say that a com-

plaint states no cause of action against a bank, when the allegations are that complainant is the owner of money in the bank's hands, which it refuses to pay over and deliver, is frivolous.

The Supreme Court of New Mexico did not make the holding alleged in the Seventh Assignment of Error, but held, in effect, that a liability was shown as against both the bank and Berryman. The only purpose to be subserved by making Berryman a party to this suit would be to estop him from denying the breach of his agreement with Mrs. Owens; but, as said in *Bushnell* v. *Chautauqua County Nat. Bank*, 74 N. Y. 290—the bank could obtain the same protection by giving him notice of the action and calling on him to defend.

Where a person is responsible over, either by operation of law or express contract, to another, has notice of a suit against the latter, and an opportunity to appear and defend, the judgment rendered in the action will be conclusive on him, whether he appeared or not.

23 Cyc. 1270;
Robbins v. *Chicago City*, 4 Wall. 657;
American Bell Telephone Co. v. *National Imp. Telephone Co.*, 27 Fed. 663;
Doty v. *Hawkins*, (N. H.) 25 Am. Dec. 459;
Wells v. *American Express Co.*, (Wis.) 42 Am. Rep. 695;
McAnelly v. *Chapman*, 18 Tex. 198;
Dusky v. *Rudder*, 80 Mo. 400;
Bushnell v. *Chautauqua County Nat. Bank*, 74 N. Y. 290.

Believing that no error has been committed, requiring a reversal of this case and not doubting the justice of appellees' cause, we respectfully ask that the judgment be affirmed.

G. A. RICHARDSON,
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W. A. DUNN,
Attorney for George A. Davisson, Appellee.

ED. S. GIBBANY,
Attorney for Etta Owens et al., Appellees.

CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, *v.* DAVISSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 551. Argued December 4, 1912.—Decided May 26, 1913.

Under the act of April 7, 1874, c. 80, § 2, the review by this court of judgments of the Supreme Court of a Territory is confined to determining whether the facts found by the court below sustain the judgment.

The facts found are certified to this court by the territorial Supreme Court either by adopting the findings of the trial court or by making separate findings of its own.

One holding in escrow an agreement and money to be paid to one of two parties according to the terms of the agreement, acts at his peril in dealing with either party without the consent of the other; and if the party to whom he pays the amount deposited is not entitled thereto he is liable to the other party.

An endorsement on the outside of the envelope containing the escrow, made by an officer of the bank acting as escrow-holder, does not protect the bank if it is not in accordance with the escrow agreement itself.

One cannot plead ignorance of a fact of which he has notice as an excuse for violating rights of parties whom he is bound to protect.

The fact that no officer of the bank has read an escrow agreement does not relieve the bank of responsibility for its action based on a separate memorandum made by one of its officers and which does not express the terms of the agreement.

An extension verbally agreed to for completing the record title to the property where the contract to convey expressly provides for such an extension without specifying its length in case defects are developed, is not a parol variation or modification of a written contract.

In this case a bank acting as escrow-holder with notice of the contract, having by paying over to one party failed in its duty to act impartially, it is liable to the other party who was entitled to the money under the contract.

16 N. Mex. 689, affirmed.

THE facts are stated in the opinion.

Mr. William C. Reid, with whom *Mr. James M. Hervey* was on the brief, for appellants:

The holder of papers deposited with a bank in escrow can redeliver the paper deposited by one of the parties, to him, after the other party to the escrow agreement is in default in the performance of everything he was bound to perform,—without the consent of such other party in default, or order of court. 16 Cyc. 576, 584; 11 Am. & Eng. Enc. of Law, 352; *Humphrey* v. *Richmond R. R. Co.*, 13 S. E. Rep. 985; *Burlington R. R. Co.* v. *Palmer*, 42 Iowa, 222; *Bodwell* v. *Webster*, 13 Pick. 411; *Hayton* v. *Meeks* (Ark.), 14 S. W. Rep. 864; *Equity Gaslight Co.* v.

McKeige (N. Y.), 34 N. E. Rep. 898; *Riggs* v. *Trees* (Ind.), 5 L. R. A. 696; *Hoyt* v. *McLagan*, 87 Iowa, 146.

The court below erred in holding that the appellant bank's liability in this action is not limited by the escrow agreement and also erred in holding that the liability of the bank is to be determined by the contract of Owens and Berryman, to which contract the bank was not a party, and the terms of which were not brought to its knowledge.

The court below erred in holding that the contract between Berryman and Owens did not become unenforceable under the statute of frauds.

The bank was a stranger to any alleged parol contract, but if, as assumed by the court, it is bound by it, it could only be so bound as a privy of Berryman and the statute of frauds is available by parties to the contract, their representatives and privies. 29 Am. and Eng. Enc. of Law, 807.

The contract in question being for the sale of land, is within the statute of frauds, and the agreement that the estate should have further time in which to secure an order of the court, was a subsequent and non-permissible variation of the contract in writing by parol. *Emerson* v. *Slater*, 22 How. 42; *Swain* v. *Seeman*, 9 Wall. 254, 274.

The effect of changing the time for performance of a written contract that was in escrow with the bank would be to make the entire contract a parol contract. *Kirchner* v. *Laughlin*, 5 N. Mex. 394; *Hasbrouck* v. *Tappen*, 15 Johnson, 200; *Hersley* v. *Savanstrom*, 41 N. W. Rep. 1027; *Athe* v. *Bartholomew*, 33 N. W. Rep. 110; *Abel* v. *Munson*, 18 Michigan, 305; *Cook* v. *Bell*, 18 Michigan, 389; 29 Am. and Eng. Enc. of Law, 824.

Oral promises to convey land gain no validity at law by reason of the taking possession of land by the proposed purchaser. 20 Cyc. 289.

Unless the contract expressly provides that a deed shall be made by a third person, it must be made by the vendor

himself, even though the words of the contract are that the vendor shall execute the deed or cause it to be executed. 29 Am. & Eng. Enc. of Law, 701; Warvelle on Vendors, § 419.

Mr. W. A. Dunn, with whom *Mr. G. A. Richardson* and *Mr. Ed. S. Gibbany* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the first instance in the District Court of Chaves County, in the then Territory of New Mexico, by Davisson, as plaintiff, against the Citizens National Bank of Roswell and Mrs. Owens, as defendants. He set up a claim to be paid $5,000 as commissions on a sale of real and personal property made by him as broker in her behalf to one C. C. Berryman, claiming a right to recover against the Bank on the ground that Mrs. Owens had given to him a written order directed to the Bank for payment of the $5,000 out of money of hers that was in the hands of the Bank. Mrs. Owens answered for herself and others as Executors of Solon B. Owens, deceased, denying liability to Davisson, on the ground that the sale in question had not been consummated; and, by a cross-complaint against the Bank, she set up that a contract of sale was made by her in behalf of the Executors of Solon B. Owens, deceased, with Berryman, and, upon its execution, the sum of $9,173.32 was by agreement of the parties deposited in the Bank together with a copy of the agreement; that after examination of the title by Berryman he required the Executors to procure an order of court authorizing them to sell and convey the land, whereupon it was agreed that the time for the conveyance of the title should be extended until such date as the Executors should be able to obtain the order so required, and that in the meantime Berryman should enter into

possession of the land, and he did go into possession thereof; that afterwards Berryman abandoned the possession of the land and removed to his former home in Arkansas, and because of his not being within the jurisdiction of the Territory the Executors could not obtain service of process upon him nor sue him for specific performance of the contract of sale; that under the provisions of the contract the Executors had elected to declare said $9,173.32 forfeited by the failure and refusal of Berryman to carry out the contract; wherefore judgment was prayed against the Bank as trustee for the Executors with respect to the money in question. The Bank answered both the complaint and the cross-complaint, not denying the making of the contract between Mrs. Owens and Berryman, but denying that it was a party thereto or had any knowledge thereof or concern therewith, and asserting that the $9,173.32 was deposited with the Bank by Berryman in escrow, and subject only to the terms of a written memorandum or agreement signed by the Bank's cashier; and that because these terms had not been complied with by Mrs. Owens the responsibility of the Bank to her had been terminated, and therefore the Bank had paid the whole of the sum of $9,173.32 to Berryman, in compliance with his demand.

Upon the issues thus joined, the parties proceeded to trial before the judge of the District Court, without a jury, who rendered judgment in favor of the Bank, dismissing both the complaint and the cross-complaint.

Davisson and Mrs. Owens appealed to the Supreme Court of the Territory, which court reversed the judgment and remanded the record to the District Court with instructions to reinstate the action and proceed in accordance with the views expressed in the opinion. 15 N. Mex. 680. The grounds of decision, briefly, were that by the escrow agreement the Bank became agent for both parties, that the memorandum did not authorize it to pay over

the money to either party, and that in taking sides and making payment to Berryman it acted at its peril, and should be held responsible to Davisson and Mrs. Owens if upon a retrial they should sustain their right to the money as against Berryman.

The case was accordingly brought on again to trial before the District Court, without a jury, with the result that judgment was rendered against the Bank, in favor of Davisson for $5,000 and interest (the amount of his commissions), and in favor of Mrs. Owens and the other Executors of the Estate of Solon B. Owens, deceased, for the residue of the $9,173.32. Upon appeal by the Bank to the Supreme Court of the Territory this judgment was affirmed, 16 N. Mex. 689, and the Bank appealed to this court.

Under the act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28, our review is confined to determining the question whether the facts found by the court below sustain the judgment. And these facts are to be certified to us by the territorial Supreme Court, either by adopting the findings of the trial court, or by making separate findings of its own. *Stringfellow* v. *Cain*, 99 U. S. 610, 613, 614; *O'Reilly* v. *Campbell*, 116 U. S. 418, 421; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 312; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, 577; *Apache County* v. *Barth*, 177 U. S. 538, 542, 547; *Crowe* v. *Trickey*, 204 U. S. 228, 235; *Eagle Mining Co.* v. *Hamilton*, 218 U. S. 513; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445, 448; *Rosaly* v. *Graham*, 227 U. S. 584, 590.

The Supreme Court of the Territory, in affirming the judgment of the District Court resulting from the second trial, adopted the findings of that court, and supplemented them with certain findings of its own. From these findings, and from the admissions of the pleadings, the essential facts of the case may be summarized as follows:

On August 21, 1908, Mrs. Owens, residing at Roswell,

Chaves County, New Mexico, acting for herself and in behalf of others who were her co-executors of the estate of her deceased husband, Solon B. Owens, made an agreement in writing with C. C. Berryman of Arkadelphia, Arkansas, for the sale to him of certain lands, belonging to the Estate, situate in Chaves County, containing 360 acres, with the live stock and other personal property thereon. Davisson negotiated the sale as broker, and was entitled to a commission of $5,000 for his services if the sale should be finally consummated. The price agreed to be paid by the purchaser was $80,000, payable $10,000 in cash upon the making of the agreement (receipt whereof was acknowledged), $12,000 by assuming payment of a note for that amount held by an insurance company in Ohio and not yet due, and the balance to be secured by five notes of $11,600 each, falling due September 10, 1909, and in the four successive years thereafter. The property was to be clear of all encumbrance excepting the $12,000 mortgage. By the terms of the agreement the party of the first part, within ten days from its date (that is, on or before August 31), was to furnish the party of the second part, at Roswell, a complete abstract of title showing a good merchantable title in the party of the first part; the purchaser was to have until September 10th to examine the abstract, and if it showed a good title the transaction was to be closed at Roswell on or before September 10th, by the delivery of a warranty deed to the purchaser, he paying the consideration according to the terms of the agreement. There were the following additional clauses, which should be quoted in full:

"6th. If, upon examination of the said abstract of title, it is found that the title is not a good merchantable title, then any objections made to said title, shall be pointed out by the party of the second part, and then the party of the first part shall have ten days in which to cure said objections. Should it prove, upon examina-

tion of said abstract, that the said title is not good, and same cannot be made good within such reasonable time, then it shall be the duty of the party of the first part to perfect said title at their expense, promptly in accordance with the requirements of the party of the second part, within the time stated, and if the party of the first part fails, neglects, or refuses to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part who shall repay at Roswell, New Mexico, such sum of money as is expended by the party of the second part in perfecting said title, and if upon examination of said title it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled and the said $10,000.00 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part.

"7th. Now, if the party of the first part complies with this contract and furnishes the abstract as provided for and the title is shown to be good or can be made good, and tenders to the party of the second part at Roswell, New Mexico, a warranty deed as provided for, and the party of the second part shall fail, neglect or refuse to comply with this contract, shall fail to accept deed and execute the said notes as provided for, then in such event, the party of the second part shall forfeit the said $10,000.00 paid, at the option of the party of the first part, or at his option *and* the party of the first part shall have a cause of action against the party of the second part, enforceable in the courts of Chaves County, New Mexico, for a specific performance of contract.

"8th. Should the party of the second part, upon examination of said abstract, find the title to the said property good and within the time stated, stand willing and

able to consummate this deal, to pay the balance of purchase money and execute the notes as above provided for and the party of the first part shall fail, neglect or refuse to execute said warranty deed in accordance with this contract, then in such event, the party of the second part shall have a cause of action against the party of the first part, enforceable in the courts of Chaves County, New Mexico, for a specific performance of contract.

"9th. Possession of said property shall be given on or before the 10th day of September, 1908."

Upon the making of this written contract, it was folded and placed in an envelope, together with a check made by Berryman and payable to Mrs. Owens for the sum of $9,173.32, and the envelope and its contents were taken by Mrs. Owens, Davisson and Berryman to the Citizens National Bank of Roswell, to be held by the Bank "in escrow" until September 10th, pending the furnishing an abstract of title, a favorable report thereon, and final settlement. With the consent and approval of all the parties a memorandum was indorsed upon the envelope in the following terms: "Check enclosed to be held in escrow until September 10, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to Citizens Bank & Trust Company, Arkadelphia, Arkansas, for examination. No money to be paid over until abstract is approved by purchaser's attorneys. (Signed) J. J. JAFFA, Cashier."

Up to September 10th the Owens Estate had not made good title to Berryman, and on or about that date it was orally agreed between them that the Estate should have thirty or forty days time in which to secure an order of court, and in consideration of this, Berryman, who was stopping on expense at the hotel in Roswell, was put in possession of the property on September 10th, and he remained in possession thereof, exercising acts of ownership thereon until September 22d, on which date (the

time agreed upon for securing an order of sale through the courts, not having yet expired) Berryman, without just cause, repudiated and abandoned the contract and departed from the Territory. Meanwhile, and in consideration of the verbal arrangement of September 10th, the Estate took immediate steps at considerable expense to secure the required order of court, and did in fact secure it on October 5th. But at some time after September 10th (the precise date does not appear) Berryman demanded of the Bank the return of his check. The Bank had been notified by Davisson of the verbal agreement of September 10th extending the time in which to perfect the title to the land, but had no other knowledge of this, and the granting of this extension was denied by Berryman. The Bank complied with his demand and returned to him the check of $9,173.32, or its equivalent. It appears that no officer of the Bank ever read the contract of sale or knew of its terms; and the Bank so far as appears, had no knowledge of what had taken place between Mrs. Owens and Berryman after the contract and check were left with it except for Davisson's notification respecting the verbal arrangement made on September 10th. After the Bank had turned over to Berryman the check or its equivalent, Mrs. Owens and Davisson demanded from the Bank their respective shares of the money, and the demands not being complied with, the present action resulted. Berryman, being absent from the Territory, was not joined as a party.

The fundamental proposition that underlies the whole argument for the appellants is that the Bank had no concern with anything beyond the terms of the escrow as manifested in the written memorandum endorsed upon the envelope. But this memorandum is evidently not a complete expression of the agreement between the parties, and indeed is unintelligible except by reference to the contract of sale. It does not mention the names of the

parties or either of them; does not specify what "settlement" is to be made, nor where; does not state by whom "deed and abstract" are to be placed in escrow, nor when, nor for what purpose. Above all, and more important for the present purpose, it does not either state or intimate what is to be done with the check or money if settlement is not made on September 10th, or if abstract is not "approved by purchaser's attorney."

It is clear that the instrument of August 21st came into existence as a binding contract between the parties thereto at, if not before, the time it was lodged with the Bank. We say this, notwithstanding the ambiguity of the findings in this regard; for the Supreme Court, after having stated that the parties "entered into" the contract, afterwards stated that "the contract itself was never delivered to either of the parties, other than being placed in escrow." Since the making of the contract was clearly averred in both the complaint and the cross-complaint, and was not denied by the Bank in its answer, it followed, under the local practice (Comp. Laws, N. M. 1897, § 2685, sub-sec. 67), that for the purposes of this action the averment must be taken as true. And, on general principles, the findings are to be interpreted in the light of the issue. *Reynolds* v. *Stockton*, 140 U. S. 254, 268, and cases cited.

Therefore the deposit of the agreement and check with the Bank was not technically an "escrow," in the sense that the agreement was not to take effect until performance of the condition. In the light of all the facts of the transaction, as shown by the findings, it is clear that the parties treated the agreement as in force between them. And the terms of the memorandum endorsed on the envelope are consistent with this.

The contract of August 21, 1908, being in force as a contract between the parties, it is plain that the memorandum endorsed upon the envelope was not intended to modify its provisions.

Upon the whole case, we are clear that the effect of the deposit of the contract and check with the Bank was to constitute it a custodian or stakeholder for the benefit of both parties, holding the money without right or interest in it, bound above all things not to take sides between the parties, and answerable ultimately to the one or the other, according to their respective rights as between themselves.

The endorsement upon the envelope was a mere memorandum, not containing any clear expression respecting the agreement of the parties, and evidently unintelligible unless read in connection with the contract of sale. Quite as manifestly the deposit had no reason for existence except in aid of that contract and as a protection to both contracting parties.

The fact that no officer of the Bank read this contract or knew of its terms is of no avail to the Bank. By the very circumstances of the deposit it was put upon notice that it was assuming a duty that could not be fully understood or fairly performed without a knowledge of the contents of the contract; it had possession of that instrument, with full opportunity to examine it; except for its own negligence it would have known the terms thereof. To permit it now to set up its own ignorance as an excuse or justification of its conduct in violating the rights of one of the parties to the contract would be to permit it to take advantage of its own wrong.

Berryman's check to the order of Mrs. Owens for $9,173.32, having been deposited as a substitute for the cash payment of $10,000, called for by the agreement of August 21, was of course subject to be forfeited under the terms of the agreement as above recited, in the event that Berryman failed to comply with his contract.

The facts found show that while the vendors were doing what he had required them to do, and, so far as appears, all that they were called upon to do, to make a

good title under the contract, he repudiated and abandoned it, without just cause, gave up possession of the property and departed from the Territory. On familiar principles, this absolved the Owens' Estate from any further performance of conditions precedent on their part. *Roehm* v. *Horst*, 178 U. S. 1, 8, 16, and cases cited; *O'Neill* v. *Supreme Council*, 70 N. J. Law, 410; *Holt* v. *United Security Life Ins. Co.*, 74 N. J. Law, 795, 801; 76 N. J. Law, 585, 590.

It is contended that the verbal arrangement made between the Owens' executors and Berryman on or about September 10th, for an allowance of time within which to procure the court order, was an attempt to vary the written contract, and that this could not be done without writing, because of the statute of frauds. *Emerson* v. *Slater*, 22 How. 28, 42; *Swain* v. *Seamens*, 9 Wall. 254, 272.

Without stopping to inquire as to the bearing of the statute, a sufficient answer to this point is that the verbal arrangement of September 10th was not variant from, and therefore did not have the effect of modifying, the written agreement of August 21st. That agreement did not call for the passing of title on or before September 10th, unless the abstract showed a good title; if it did not, and objections were pointed out by the purchaser, the vendors were to have at least ten days in which to cure his objections, and if the title could not be made good "within such reasonable time" (evidently referring to the ten days) "then it shall be the duty of the party of the first part to perfect said title at their expense, promptly in accordance with the requirements of the party of the second part, within the time stated, and if the party of the first part fails, etc., to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part, who shall repay," etc.

The contract did not fix any specified time, upon the expiration of which Berryman was entitled to treat it as being at an end. It foresaw possible delays respecting the perfection of the title, and contemplated a verbal agreement allowing to the vendors a reasonable time for this purpose. The verbal arrangement, allowing to the Executors "thirty or forty days time in which to procure an order of court," was in effect a "stating of time" by Berryman, within which his "requirements" should be complied with, as provided by the sixth paragraph of the written agreement.

That instrument stated what should be deemed sufficient ground for an annulment of the sale, and a return to Berryman of the $10,000, paid on account of the purchase money, and did not set any time limit, the language being: "And if upon examination of said title it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled and the said $10,000 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part." Berryman, having himself repudiated the contract before any default was made by the vendors, thereby dispensed with a tender or further performance on their part, and forfeited to them the money deposited.

The Bank, with fair notice of this, and in violation of its duty of acting impartially between the parties, paid the money over to Berryman, and thereby became liable to respond to the Executors, in whose behalf the contract was made by Mrs. Owens, and who were represented by her in this action.

It follows that the facts fairly sustain the judgment of the court below. Upon this appeal no controversy is raised as between Davisson and the Executors.

Judgment affirmed.